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IN THE

SUPREME COURT

OF

WISCONSIN

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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MEMORANDA.

Mr. Chief Justice WINSLOW took no part in the decision of cases reported in this volume except those appearing on pages 40–93, 109–115, 508–514.

Mr. Justice KERWIN took no part in the decision of cases reported in this volume except those appearing on pages 40–93 and 508–514.

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IN MEMORIAM.

JAMES GREELEY FLANDERS.

On the 1st day of June, 1920, Mr. Frank M. Hoyt of Milwaukee addressed the court as follows:

May it please the Court:—The members of the committee appointed by the Milwaukee Bar Association to prepare and present to this court a memorial on the life of the late JAMES GREELEY FLANDERS respectfully submit the following:

Memorial of the Milwaukee County Bar Association.

Mr. FLANDERS was born in New London, New Hampshire, December 13, 1844. His father was Walter P. Flanders of that city, his mother Susan Everett Greeley of Newburyport, Massachusetts. He came with his parents to Milwaukee in 1848. He attended the schools of that city until 1858. He then went to the Phillips (Exeter) Academy, from which he was graduated in 1861. He taught school for two years in Milwaukee, and in 1863 entered Yale College, graduating therefrom with honors in 1867.

Mr. FLANDERS came from a family of lawyers. His father and grandfather were members of the New Hampshire bar and of the legislature of that state. His grandfather served in the American army during the War of the Revolution.

Shortly after Mr. FLANDERS was graduated from Yale he commenced the study of the law in the office of Emmons & Van Dyke, then leading lawyers in Milwaukee. He then took the full course in the College of Law of Columbia University, and after he was graduated therefrom was admitted to the bar of New York by the supreme court.

In 1869 he entered upon the practice of his profession in Milwaukee, forming a copartnership with Mr. DeWitt Davis under the name of Davis & Flanders. Later, Mr. A. R. R. Butler, one of the leading lawyers of Milwaukee, became a member of the firm, the name thereof being changed to Butler, Davis & Flanders.

The firm stood in the front ranks of the profession in the state until its dissolution about 1877. Mr. FLANDERS then formed with Mr. Elias H. Bottum the firm of Flanders & Bottum, which continued until 1888, when, on the appointment of James G. Jenkins to the office of United States district judge, the members of the firm of which he had been the senior joined with Messrs. Flanders and Bottum in organizing the copartnership of Winkler, Flanders, Smith, Bottum & Vilas, which on the retirement of Mr. Vilas in

1904 became Winkler, Flanders, Smith, Bottum & Fawsett and for years was recognized as one of the strongest law firms in the state.

After the death of Mr. Smith and the retirement of General Winkler in 1917, Mr. FLANDERS formed a copartnership with Mr. Charles F. Fawsett under the name of Flanders & Fawsett. Upon the admission of Mr. Edward M. Smart to the firm its name was changed to that of Flanders, Fawsett & Smart. Of this firm Mr. FLANDERS continued to be a member up to the time of his death, although for a period of upwards of four years prior thereto his failing health precluded him from taking any active part in the practice of the law.

Mr. FLANDERS was married in 1873 to Mary C. Haney, daughter of Robert Haney of Milwaukee. He died at Milwaukee on January 1, 1920. He is survived by his widow, his son, Roger Y. Flanders, his daughter, Mrs. Joseph W. Simpson of Milwaukee, and his sister, Mrs. Samuel B. Duryea of Brooklyn, New York.

Trained in one of the best preparatory schools in the country and graduated from Yale, with his fine intellectual abilities thus disciplined, Mr. FLANDERS brought to the study of the law the same devotion to work which won for him high scholastic honors. He very soon became known as one of the most promising of the younger members of the bar of this state and rapidly rose to be one of its leaders. Thoroughly learned in the law and always studying each of his cases with close attention to detail, he entered upon the trial thereof prepared to press with full strength the propositions favorable to his client and with all weak points carefully guarded.

As a trial lawyer he had no superior in the state. With him a trial was always a battle. He fought fairly, but always with great vigor, neither asking nor giving quarter. He was logical and eloquent in his arguments to juries. He was strong in his presentment of legal propositions to the court. Before neither was there at any time any indirectness in his methods. He never stooped to any pettiness, but always stood out in the open. He impressed both court and jury with his manifest belief in the honesty of his client and the justice of his cause. He won by far the greater proportion of his cases, and those which he lost were lost only after he had fought them out to the bitter end.

As one of the leaders of the bar Mr. FLANDERS was retained and served as counsel in a very considerable part of the important litigation which arose in this state during the period of his active service at the bar. The records of this court afford evidence of the many cases in which he was engaged. Among the cases in the United States courts in which he took a conspicuous part were the Northern Pacific Foreclosure, the Street Railway Securities Holders, and the Dust Collector cases, in each of which complicated

legal situations arose and very large amounts of money were involved. The success which attended his efforts fully justified the confidence his clients placed in him.

Notwithstanding Mr. FLANDERS's aggressiveness in the court room, no one was quicker than he to respond to a fair proposition for the settlement of any dispute. No lawyer who approached him for that purpose squarely and honestly ever ran the slightest risk of not meeting reciprocal conduct on his part, or had any occasion to fear that any advantage whatever would be taken of what he did or said. He was the very soul of honor in his dealings with his brethren at the bar, courteous, patient, and considerate.

Like all lawyers who have won distinction at the bar, his advice and guidance were sought by a large number of clients having important business interests in charge. In this branch of his work he displayed the same accurate judgment which he evinced in the trial of cases. He always exhausted every effort to adjust and settle a dispute before he permitted his client to indulge in the luxury of litigation.

He was a public-spirited man and took an active interest in politics. He served as a member of the school board, of the public library, and of the state legislature. He was a delegate to the National Democratic Convention in 1896. He differed from the action there taken by his party on the silver issue, and was a delegate to the Indianapolis convention of Gold Democrats.

Socially he was a most delightful companion. Well read, well informed, his conversation was always instructive and entertaining. The kindliness of the man showed in every action. His friends were devoted to him. They not only admired him for his brilliant intellectual qualities, but his courtesy was always so genuine, his goodness so apparent, that he endeared himself to all who knew him.

He died at the age of seventy-five, having in the fullest measure the esteem and affection of the bar and the community, and leaving behind him an enviable record of good work well done.

FRANK M. HOYT.
GEO. D. VAN DYKE.
CHARLES F. FAWSETT.

Mr. Justice ESCHWEILER responded:

In responding on behalf of the court to the request that the final record shall here and now be made and entered of Mr. JAMES G. FLANDERS as it is now being presented in this memorial and tribute by those who knew so well of his brilliant and prominent career, there is something akin to a melancholy satisfaction in being also able to speak from personal knowledge of the man and his life work.

James Greeley Flanders.

Mr. FLANDERS was in his full vigor and prime of manhood and in the front ranks of his honored profession when, as a trembling tyro at the bar, I first had occasion to meet him. Right then and there I learned from personal experience that which has been emphasized in the memorial here presented by his personal friends and fellow members, that no one doing business with Mr. FLANDERS in the court room could remain long in doubt but that to him a lawsuit was, as I have often heard him express himself, no pink tea.

The passing of years often encrusts the active practitioner at the bar with a shell that is more or less forbidding and austere to the younger lawyers. I know that this was not the case with Mr. FLANDERS. The gladiator within the forensic field was upon leaving the scene of conflict immediately transformed into the approachable, companionable, likable man. His personality, strength, learning, and ability made him a commanding figure at the bar during the long years of his practice, as has been so finely pointed out in the tribute of his friends. The tribute to him and the memory of his life so inevitably soon to mingle with the traditions of the leaders of Wisconsin's bar both deserve and are hereby directed to be preserved in the records of this court.

CASES DETERMINED

AT THE

January Term, 1920.

WISCONSIN SAVINGS LOAN & BUILDING ASSOCIATION, Appellant, vs. BOEHME, imp., Respondent.

January 16—February 10, 1920.

Mortgages: Deeds which are in fact mortgages: Evidence: Assumption clause in deed: Consideration: Judgment declaring the instruments mortgages: Striking out assumption clause.

1. In an action to foreclose a mortgage the court may adjudge that warranty deeds given by the defendant's assignee to a codefendant were in fact mortgages and strike therefrom a clause whereby the grantee assumed payment of the mortgage.
2. In an action to foreclose a mortgage given to a building and loan association, wherein it appeared that the mortgagor had executed a deed to the property containing a clause that the grantee assume the mortgage, and that the land passed by similar deeds to defendant, who claimed that the deed from his immediate grantor was in fact a mortgage, the fact that testimony of both grantor and grantee that such deed was prepared in a certain real-estate office was contradicted by conclusive evidence that it was prepared in the office of plaintiff did not so discredit their testimony as to make erroneous a finding that the deeds were mortgages.
3. The land having passed by deeds wherein the grantee assumed the mortgage to one of the defendants, who contended that the deed from his immediate grantor was in fact a mortgage, the evidence is *held* to support a finding that the transaction was for the purpose of extending security to the defendant and that the deed executed to him was in fact a mortgage.
4. Where a deed is in fact a mortgage and executed for the purpose of extending security to the grantee, a clause wherein the grantee assumes a mortgage on the property conveyed is not supported by a consideration, and it is immaterial whether the clause was inserted through fraud, or mistake, or whether the grantee knew thereof.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Affirmed.*

Mortgage foreclosure. Plaintiff was a savings, loan and building association. In October, 1912, the defendant William Strauss subscribed for membership in said association and a certificate for eighty shares of stock was issued to him. Two weeks later Strauss secured a loan of $8,000 from the plaintiff and, as collateral security therefor, executed one of the mortgages sought to be foreclosed in this action. In December, 1912, he and his wife, by warranty deed, conveyed the premises to Oscar Strauss, who assumed and agreed to pay the mortgage. January 20, 1913, Oscar Strauss conveyed the premises by warranty deed to defendants James O'Connor and Josephine O'Connor, his wife, who assumed and agreed to pay the mortgage, and shortly thereafter William Strauss assigned his certificate in the building and loan association to O'Connor and wife. On May 12, 1913, O'Connor and wife conveyed to the defendant *Louis Boehme* by warranty deed, by the terms of which *Boehme* assumed and agreed to pay the mortgage. August 1, 1913, another deed from the same grantors was executed to *Boehme,* which also contained a clause by which *Boehme* assumed and agreed to pay the mortgage. The certificate of stock in the building and loan association was also duly assigned to *Boehme* May 12, 1913. On August 2, 1913, *Boehme* conveyed the premises to H. E. Hoffman, who thereafter conveyed the same to Adolph L. Kern, subject to a certain land contract which she had given to the Friedmann Laboratories for Tuberculosis Research.

The defendant *Boehme,* in answer to the complaint, alleged, in effect, that the O'Connors had executed and delivered to him the warranty deeds merely as security for moneys which O'Connor owed him at the time and as security for moneys which *Boehme* was to advance to the building and loan association in monthly instalments as they should come due in order to protect O'Connor's interest in

the premises, and that the deeds were in fact mortgages, and prayed that they be so declared by the court, and that the clause therein by which he assumed and agreed to pay the mortgage in question be stricken therefrom. Upon this contention the court found in favor of *Boehme* and that he was entitled to judgment declaring said deeds to be mortgages, and that they be further reformed by striking from each of the said deeds the clause wherein said *Louis Boehme* assumed and agreed to pay the $8,000 mortgage given to the plaintiff by William Strauss and wife. The court also found that said clause was fraudulently inserted in said deeds without the knowledge of *Boehme* and his grantors and contrary to their agreement and understanding. The plaintiff appealed from that part of the judgment adjudging the deeds to be mortgages and striking from each of said deeds the clauses wherein the said *Louis Boehme* assumed and agreed to pay the $8,000 mortgage.

For the appellant there was a brief by *Kronshage, McGovern & Hannan* and *McGovern, Hannan, Devos & Reiss,* all of Milwaukee, and oral argument by *Wallace Reiss* and *T. J. Hannan.*

For the respondent *Boehme* there was a brief by *William J. Morgan,* attorney, and *Hoyt, Goff & Morgan,* of counsel, all of Milwaukee, and oral argument by *William J. Morgan.*

OWEN, J. That it was competent for the court, upon sufficient evidence, to adjudge the warranty deeds to be in fact mortgages and to strike therefrom the assumption clause, is settled by the case of *Broadbent v. Hutter,* 163 Wis. 380, 157 N. W. 1095. The only question is whether the findings of the court in this respect are supported by clear and satisfactory evidence.

It appears without dispute that *Boehme* and O'Connor had been friends for twenty years; that formerly O'Connor had managed the Pabst Hotel in the city of Milwaukee and

prospered while in that business; that he sold out the Pabst Hotel business and purchased the Lalumiere Hotel at Oconomowoc, when he met with reverses and lost about all he had; that *Boehme,* as a friendly act, advanced him $4,000 with which to repurchase the Pabst Hotel business; that O'Connor had repaid him but a small portion of the $4,000 loan, and that at the time of the execution of the deed there was more than $3,000 still due. O'Connor had purchased these premises through Benjamin Frey, Inc., a real-estate agency in Milwaukee, which had assured him of an early sale, and he left the property in the hands of the company for that purpose. A purchaser was not procured as readily as was expected, and O'Connor was defaulting in his monthly payments to the building and loan association. The Frey Company urged him to make some arrangements to meet these payments, representing to him that a better sale could be secured if he was not in default thereon. O'Connor went to *Boehme* and voluntarily offered to deed him the property as security for his existing indebtedness and for such sums as it might be necessary to advance to keep up the payments to the building and loan association until a sale of the property could be secured. *Boehme* had not asked O'Connor for security, and dealing in real estate was entirely foreign to his business. After consulting with the Frey Company and being advised that he would incur no responsibility by taking the deed, and upon further assurance that the deed would be the proper instrument for the purpose, he acquiesced in O'Connor's proposal, and on that day paid to the building and loan association over $400, in which amount O'Connor was in default to the association. He also made monthly payments of $106.67 in June, July, and August. The property remained with the Frey Company for disposal. *Boehme* exercised no control over it, but stated to O'Connor and the Frey Company that when they wanted him to telephone to him, and he would sign such papers as they required.

The plaintiff seemingly attaches great significance to the circumstance that both *Boehme* and O'Connor testified that the deeds from the O'Connors to *Boehme,* especially the first one, were executed in the office of the Frey Company. After the case had been tried and the court had filed findings of fact and conclusions of law ordering judgment in favor of *Boehme* upon his contention, plaintiff discovered that the first deed was drawn in the office of the building and loan association by the assistant secretary thereof, and made application to the court to have the case reopened for the purpose of taking testimony, among other things, upon the question of where the first deed was in fact prepared. The application was granted by the court, and upon the taking of such additional testimony it did appear quite conclusively that the first deed was prepared in the offices of the building and loan association, and not in the Frey office, as formerly testified to. Plaintiff urges that this incident so discredits the testimony of *Boehme* and O'Connor that the finding of the court that the deeds as given were mortgages should not be sustained. We cannot so view it. The case was tried five years after the transaction. While *Boehme* and O'Connor, upon the first hearing, were positive that the deed was drawn in the Frey office, they also testified to negotiations had in the office of the building and loan association at about the same time and as a part of the same transaction. It is not at all surprising that after a period of five years their recollections should not be entirely clear as to whether the deed was drawn in the Frey office or in the office of the plaintiff, nor can we attach much importance to the question of whether it was drawn in the one or the other office. The controlling circumstances are that O'Connor owed *Boehme* money; that he had the property listed with the Frey Company for sale or exchange; that he was in default upon his payments to the building and loan association; that in order to preserve his interest in the property such payments had to be made; that he offered the security

to *Boehme,* unsolicited by him, and that *Boehme* advanced him more money for the purpose of making his payments to the building and loan association, exercised no control over the property, but left it in the hands of the Frey Company and executed a deed therefor to whom and when O'Connor directed. All of these circumstances, about which there can be no controversy, strongly indicate that the transaction was for the purpose of extending security to *Boehme,* and that the warranty deeds executed by the O'Connors were intended to be, and in fact were, mortgages.

If they were mortgages, then the assumption clause had no place therein and there was no consideration upon which the agreement can be supported. *Broadbent v. Hutter, supra.* There being no consideration in support of the agreement to assume the mortgage, it matters not whether the clause was inserted through fraud, as the court found, or by mistake of the scrivener, or the mutual mistake of the parties, or whether *Boehme* knew, or in the exercise of proper care should have known, that the deed carried with it an agreement to pay the $8,000 mortgage. The agreement, being void for want of consideration, cannot be enforced, and it was properly stricken out. The findings of the court of which appellant complains are well supported by clear and satisfactory evidence, and that portion of the judgment granting affirmative relief to *Boehme* should be affirmed.

By the Court.—Judgment affirmed.

MANTZ, Respondent, vs. SCHOEN & WALTER COMPANY and others, Appellants.

January 16—February 10, 1920.

Appeal: Order refusing to suppress adverse examination: Special proceeding: Continuing a provisional remedy.

An order refusing to suppress the examination of a party under sec. 4096, Stats., before trial, is not a "special proceeding" as contemplated by sec. 2594, and does not continue a provisional remedy under sub. (3), sec. 3069, and hence is not appealable.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Dismissed.*

The appeal is from an order denying the application of the defendant *Schoen,* in his capacity of vice-president, treasurer, and general manager of the defendant *Schoen & Walter Company,* a corporation, and the application of the corporation to dismiss the action as to this corporation and *Schoen* as such officer and to dismiss and suppress the proceeding in the action for an examination of the corporation and of *Schoen* as such officer under sec. 4096, Stats.

For the appellants the cause was submitted on the brief of *Charles F. Puls, Jr.,* and *Christian Doerfler,* both of Milwaukee, and for the respondent on that of *Adolph Kanneberg* of Milwaukee.

PER CURIAM. The trial court held that the affidavit of plaintiff sufficiently charges in general the nature and object of the action and is sufficient to entitle the court to proceed with the examination, and that the petition to dismiss the action and suppress the proceeding for an examination of the petitioner as officer of the corporation must be denied. In *Milwaukee C. Co. v. Flagge,* 170 Wis. 492, 175 N. W. 777, it is held that an order refusing to suppress an examination of a party under the provisions of sec. 4096, Stats., before trial, is a mere proceeding in an action, and

is not a special proceeding as contemplated by sec. 2594. It was there also determined that such an order does not continue a provisional remedy within the provisions of sub. (3), sec. 3069, and hence such an order is not appealable.

By the Court.—The appeal is dismissed.

DERING, Appellant vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

January 16—February 10, 1920.

Automobiles: Collision with street car: Contributory negligence: Stopping of street car not invitation to cross street: Appeal: Errors in instruction in favor of prevailing party.

1. In an action for damages to an automobile in a collision with a street car at a street intersection, the evidence is *held* sufficient to sustain a finding of contributory negligence of plaintiff, although the street car ran into the automobile.
2. Appellant cannot complain of instructions which related to questions that were answered in his favor.
3. The stopping of a street car at a customary place for discharging and taking on passengers is not an invitation to a traveler in an automobile to cross ahead of it; and if he is so situated that the street car can safely start and safely continue if he yields the right of way and can safely do so, the car may proceed upon its trip.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

Action begun in the civil court to recover damages for injury to plaintiff's automobile sustained in a collision with defendant's street car at the intersection of West Water street and Wells street in the city of Milwaukee on the evening of October 9, 1917. Wells street runs east and west. West Water street runs in a northwesterly and southeasterly direction. Plaintiff was proceeding east on Wells street and the car that struck him was running northwesterly on the east track on West Water street. There are also double

street-car tracks on Wells street intersecting those on West Water street. Each street is about fifty feet wide from curb to curb and the car tracks are practically in the center of the street. According to plaintiff's testimony he was hit at a point about six or eight feet south of the south rail of the south track on Wells street where it crosses the east rail of the east track on West Water street. The defendant's testimony places the collision further north, some witnesses as far north as north of the north track on Wells street. When plaintiff first saw the car that hit him it was standing on the south side of Wells street discharging passengers.

The jury found defendant negligent, its negligence the proximate cause of the injury, and damages, but they also found plaintiff guilty of contributory negligence. The court entered judgment for defendant dismissing the action upon the merits. Upon plaintiff's appeal to the circuit court a judgment of affirmance was entered, and from such judgment plaintiff appealed.

Martin J. Brennan of Milwaukee, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Ralph M. Hoyt,* all of Milwaukee.

VINJE, J. Plaintiff contends (a) that there is no evidence to sustain the jury's finding of contributory negligence and (b) errors in instructions to the jury. From the foregoing statement of facts it will be seen that even upon plaintiff's own contention the car that hit him had run at least fifteen feet from where it stood discharging passengers before it ran into him. In so doing the testimony shows it had run at an average speed of not more than three miles per hour. He testified that he ran his auto from four to eight miles per hour and had it under perfect control though the street was wet. If he went four miles per hour he would be eighteen feet from the car track when the street

car started up. If he went faster he would be further from the car track. But assuming he went only four miles per hour, he would have plenty of space to stop his car in after the street car started up. If he went faster than that he would have more space, and if the collision occurred further north, as the jury well might find, the street car had been under way a longer time and he would have a better opportunity to stop. It is true he looked to the north and saw a car standing there discharging passengers, but that was farther away. When he reached the zone of danger from the north-bound car it was his duty to look again to see if it had started. Had he done so he could have seen it in motion in time to avoid a collision. Either he did not look or looked and took his chance to cross ahead of it. In either case the jury could find him guilty of contributory negligence. The fact that the street car ran into him and not he into it is of no consequence. Negligence is not necessarily lacking in the one who is being run into.

The instructions complained of related to questions that were answered in favor of plaintiff, and error, if any, therein cannot be invoked to reverse the judgment on his appeal.

The stopping of a street car at a customary place for discharging and taking on passengers is no invitation to the traveler to cross ahead of it. If he is so situated that the car can safely start and safely continue if he yield the right of way and can safely do so, the car may proceed upon its trip, otherwise street-car traffic might be blocked indefinitely by travelers on the street or sidewalk. The case of *Canning v. C. & M. E. R. Co.* 163 Wis. 448, 157 N. W. 532, relied upon by plaintiff, was where a car stopped in the middle of the block, and it was held that such stopping might be construed as an invitation to a man driving a team out of an alley to cross ahead of it.

By the Court.—Judgment affirmed.

PINZ, by guardian *ad litem,* Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

January 16—February 10, 1920.

Street railways: Failure of pedestrian to look for car: Evidence: Contributory negligence: Instructions: Negligence: Presumption of ordinary care by injured person.

1. In an action to recover for injuries to a woman eighty-six years old who was struck by a street car while attempting to cross the street ahead of the car, the jury having found that the car was being run at a dangerous and unreasonable rate of speed, the testimony of an eye-witness of the accident is *held* to support a finding of the jury that plaintiff did not look before entering the danger zone, as against a contention that the finding was contrary to the established physical facts.
2. Where there was evidence of want of care on the part of plaintiff, an instruction that she was presumed to have looked and listened before entering the danger zone, that she conducted herself as the greater mass of women of her age and infirmities would have conducted themselves under the same circumstances, and that she was presumed to exercise the care that women of her age and infirmities would have exercised under the same circumstances, was properly refused, as not being a correct statement of the law applicable to the case.
3. In the absence of all evidence, a person injured is presumed to have been in the exercise of ordinary care; but such presumption does not obtain where there is credible evidence to the contrary.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Personal injury. The plaintiff, a woman eighty-six years of age, attempted to cross Vliet street in the city of Milwaukee ahead of an approaching street car. She was struck, injured, and brought this action in the civil court of Milwaukee county to recover damages. The jury found that the street car was being run at a dangerous and unreasonable rate of speed; that the motorman was guilty of a want of ordinary care in the operation of his car; that the

operation of the car at an unreasonable rate of speed, and the want of ordinary care on the part of the motorman, was the proximate cause of the injury; that the plaintiff was not guilty of contributory negligence; and that the plaintiff did not look before entering the zone of danger. After verdict the plaintiff moved the court to change the answer to question 5 so that the verdict would find that the plaintiff did look before entering the zone of danger, and for judgment on the verdict as so changed. The defendant moved for judgment upon the verdict. The defendant's motion was granted. There was an appeal to the circuit court from the judgment of the civil court. On the appeal the judgment of the civil court was affirmed, and from the judgment of the circuit court this appeal is taken.

Martin J. Brennan of Milwaukee, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Ralph M. Hoyt,* all of Milwaukee.

ROSENBERRY, J. Two questions are presented. The plaintiff claims, first, that the verdict of the jury, finding that the plaintiff did not look before entering the zone of danger, is contrary to the established physical facts; and second, that the trial court erred in refusing the plaintiff's request to instruct the jury as follows:

"You are instructed as to the fifth question of the special verdict that the plaintiff is presumed to have looked and listened before entering the zone of danger; that she conducted herself as the greater mass of women of her age, her infirmities, would have conducted themselves under the same circumstances; and that plaintiff is presumed to exercise the care that women of her age and infirmities would have exercised under the same circumstances," citing *Whitty v. Oshkosh,* 106 Wis. 87, 81 N. W. 992.

1. We have carefully examined the evidence and plaintiff's argument in support of the first contention, and are of the opinion that the verdict of the jury is amply supported

by the evidence and not contrary to the established physical facts.

2. The trial court did not err in refusing the requested instruction, because it is not a correct statement of the law applicable to the case. While it is true that in the absence of all evidence persons are presumed to have been in the exercise of ordinary care, such presumption does not obtain where there is, as in this case, credible evidence to the contrary. An eye-witness testified that plaintiff did not look. The verdict of the jury shows that the testimony of this witness was credible. The request, made as it was without qualifications, was for that reason alone properly denied. The trial court properly submitted the matter to the jury upon the whole evidence as it stood.

By the Court.—Judgment affirmed.

STATE EX REL. HOUGHTON and others, Respondents, vs. PHELPS, County Clerk, etc., Appellant.

January 16—February 10, 1920.

Income tax: Law firms and copartnerships: Income earned and expenses incurred prior to December 31, 1911: Salaries to members deductible: Statutory construction: Appeal: Point not presented to trial court.

1. Words used in a section of the income tax statute must be given their ordinary and usual meaning.
2. A firm or partnership composed of three lawyers, who shared expenses and divided profits, was a "firm" or "copartnership" within the meaning of sub. 1, sec. 1087*m*—2, Stats., defining the term "person" as used in the income tax statute.
3. Under sec. 1087*m*—1, providing for the assessment, levy, collection, and payment of a tax on incomes received during the year ending December 31, 1911, and on incomes received annually thereafter, where a large fee earned by a firm of lawyers was paid in 1916, such firm, in returning its income for tax purposes, was not entitled to deduct the amount of expenses in the particular litigation incurred and the proportion of the fee earned prior to January 1, 1911.

4. Under sub. (a), sec. 1087*m*—4, relators, who had received in 1916 a fee for legal services beginning in 1909, were entitled, in the computation and return of the income of the firm for tax purposes, to a reasonable allowance for services of members actually rendered in producing the income, irrespective of the time when the services were rendered, whether in 1916 or prior years, and to the amount which the firm distributed among its members as their earnings in relation to the particular matter.
5. A point not presented to the court below will not be considered on appeal to this court.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

Certiorari. The plaintiffs *F. W. Houghton* and *Neele B. Neelen* were associated in a law practice in the city of Milwaukee prior to 1909, and in that year the relator *Albert B. Houghton* became also associated with them and the three continued such practice thereafter. Each individual has his own library and office furniture and they own jointly some text-books of less than $200 in value, two typewriters, and some office furniture. They do practically a cash business. All the receipts are turned into one fund, out of which are paid the rent, services of the employees, and other expenses, and the balance is divided from time to time among the three in an agreed proportion.

In 1909 *Mr. F. W. Houghton* was employed in the prosecution of a claim in the court of claims for the Mille Lac band of Chippewa Indians in the state of Minnesota against the United States on account of losses claimed to have been sustained by such band by reason of the opening of the Mille Lac reservation in said state. This proceeding was pursuant to authority given by act of Congress of February 15, 1909 (35 U. S. Stats. at Large, 619, ch. 126), which also provided that upon the final determination of any such suit the court of claims should have jurisdiction to decree the fees to be paid to the attorneys and that such should be paid out of any sum found due said band.

The litigation involved an appeal to the supreme court of

the United States. *U. S. v. Mille Lac Band of Chippewa Indians,* 229 U. S. 498, 33 Sup. Ct. 811. Thereafter and in October, 1916, upon petition to said court of claims, the fee of the attorneys in said litigation was fixed at about $100,000, to be paid out of the fund of nearly $700,000 secured for said band.

Pursuant to stipulation between the attorneys so engaged, the sum was so divided that there was paid to *Mr. F. W. Houghton,* in addition to the expenses of about $3,100, the sum of $21,117.01 as fees, which will be referred to hereinafter as $21,000, for convenience. This was received by him December 27, 1916, and distributed, as was the other income of the firm for that year, to the several plaintiffs in their respective proportions.

Mr. F. W. Houghton spent in such litigation about 413 or 407 days, 84 of which were spent in 1909 and 1910. On such a *per diem* and percentage basis, $4,300 would be about the proportionate amount of services in said matter in 1909 and 1910 out of the entire fee of $21,000. Of the $3,100 expenses, $172.31 were incurred in 1909 and 1910.

The three relators made a return to the assessor of incomes for the year 1916 as a firm or copartnership, and each individual made his separate return. In the joint return the relators showed the gross receipts of the firm, including the $21,000. They deducted therefrom the said $4,300 as being earned prior to 1911 and the $172.31 expenses of 1909 and 1910. From the balance thus found further deductions for expenses were made, concerning which no question is here raised, and the balance so left, together with the $4,300, being distributed among the three individuals, was claimed to be a proper deduction for the reasonable value of the services of the members of the firm in producing such income. This basis of computation would show no taxable income against such firm.

The assessor of incomes refused to allow the claimed deduction from the gross income of the two items of $4,300

and $172.31, and refused to deduct the payments made to the individual members of the firm as claimed by them.

An appeal was taken to the board of income tax review for Milwaukee county. Upon the hearing testimony was presented on behalf of the relators to the effect that the payments so made to the firm during the year 1916 were the reasonable value of the services rendered by the firm in producing such income, and no evidence was offered to the contrary.

The board of review confirmed the ruling of the tax assessor in refusing to allow the deductions of the $4,300 and the $172.31, but modified his other ruling by fixing an amount a little over one half of that actually paid to the members of the firm in that year as the reasonable value of such services. This resulted in an apparent taxable income upon which there would be due a substantial sum as an income tax. The board of review thereupon, on its own motion, made corresponding changes in the individual returns of the three relators, which were also before it.

Notice of the determination of the board of review was served on relators on September 21, 1917. In December, 1917, a writ of *certiorari* was issued out of the circuit court to review such proceedings upon the claim by said relators that the assessment so made was excessive, illegal, and void upon sundry stated grounds. Upon return being made and hearing had judgment was entered June 6, 1918, reversing and setting aside the action of the income tax board of review and the assessment by it of an income tax against the relators as such firm or copartners.

From the judgment so entered the defendant has appealed.

For the appellant there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, and *Daniel W. Sullivan,* first assistant district attorney; and the cause was argued orally by *Mr. Brossard* and *Mr. Sullivan.*

For the respondents there was a brief by *Houghton, Neelen & Houghton* of Milwaukee, and oral argument by *Albert B. Houghton.*

ESCHWEILER, J. The statutes necessary for consideration on the questions here are as follows:

Section 1087*m*—1. "There shall be assessed, levied, collected and paid a tax upon incomes received during the year ending December 31, 1911, and upon incomes received annually thereafter, by such persons and from such sources as hereinafter described; . . ."

Section 1087*m*—2. "1. The term 'person,' as used in this act, shall mean and include any individual, firm, copartnership, and every corporation, . . ."

Sec. 1087*m*—4 refers to deductions for incomes of persons other than corporations. The following deductions are provided:

"(a) Payments made within the year for wages of employees and a reasonable allowance for services of copartners or members of a firm actually rendered in producing such income."

Relators contend that such an association of individuals for the practice of law as they have here is not such a "firm" or "copartnership" as is intended to be included in those two words as they appear in sub. 1, sec. 1087*m*—2, Stats., above quoted; that the words should be limited to include such trading or mercantile partnerships as have or need to have capital invested in order to properly carry on business.

The words used in this statute must be given their ordinary and usual meaning. *Bayfield Co. v. Pishon,* 162 Wis. 466, 470, 156 N. W. 463. When lawyers are associated in carrying on a law practice as relators do, they are usually and ordinarily spoken of and recognized as a law firm or firm of lawyers. In the absence of any statutory circumscribing of the term, we see no escape from the conclusion that the firm comprised of the relators in this case was such a firm as is designated in the statute above quoted.

Relators further contend that the $172 expenses and the $4,300, being the proportionate amount of the earnings out of the $21,000 fee, all being as of prior to January 1, 1911, should not be considered for income-tax purposes as part of the income received in the year 1916; that it is in effect something that belonged to the firm as in the nature of capital to be considered as in existence prior to 1911, and therefore, under the decision of this court in *State ex rel. Bundy v. Nygaard,* 163 Wis. 307, 158 N. W. 87, not subject to be reached for income-tax purposes. That case pointed out the difference between capital and income, and under that ruling and the plain meaning of the two terms we must hold that the term "income," as used in sec. 1087*m*—1, *supra,* covers and includes just such and all of such a fund as was the $21,000 fee received by relators as part of their gross income of 1916. Cash thus received in that year is income of that year, and cannot be separated for income-tax purposes by any method of differentiation based upon questions as to when services may have been rendered for which such money was payment. To hold otherwise would be to do violence to the plain language of the statute and the general rules of construction thereof. In the long run it works no hardship, and above all is evidently the determination of the legislature.

Under sub. (a), sec. 1087*m*—4, *supra,* the relators' firm is entitled to have deducted from the income of 1916 the payments made during that year of a reasonable allowance for services of members of the firm actually rendered in producing such income.

The board of review arbitrarily fixed a sum much less than that actually paid to and distributed among the members of the firm that year as being in its judgment such a reasonable allowance. The relators contend that there was no basis for such an arbitrary allowance and that the several amounts paid to the members of the firm during that year

were reasonable in amount and were for services actually rendered in producing the income received in that year.

Having held, as we have above, that the money received during the year 1916 for legal services, irrespective of the time when the services were rendered, is, for the purposes of these statutes, the income for that year, it follows as a necessary and proper corollary to that proposition that the services which were necessary in order to produce such income are the services actually rendered in producing such income no matter when so rendered. The statute prescribes no time limitation, nor can we find any ground for inserting any such. The services for which the allowance is to be made are those rendered in producing the particular income, not those rendered merely during that particular year. If the relators are to be charged for taxing purposes with the cash received for services no matter when rendered, they are entitled, under a fair and reasonable construction of the statutes before us, to have considered the entire services necessarily rendered in producing such cash income whenever such were rendered.

There would be a strong if not conclusive presumption that the $21,000 allowed by the court of claims for the services in the Indian case was a reasonable allowance in view of the fact that it was fixed and determined by the court before whom most of the services were rendered and under express statutory authority given so to do. But in any event the testimony before the board of review established that in such situations as we have here the money which a firm of lawyers distributes among its members out of its income as their earnings is the reasonable allowance to them for their services rendered in producing such income.

This holding requires a finding that there was no taxable income to be assessed against these relators as a firm for the year 1916, and the judgment below in vacating the assessment was properly entered.

It is now contended by defendant that the application for the writ was too late, in that the matter of assessing and levying the income tax against the plaintiffs had passed beyond the jurisdiction of the defendant and the county board of review, and that the judgment could not save the plaintiffs against its enforcement, it having already reached the city tax roll.

The point not having been presented to the court below, we shall not pass upon it here. *Will of Brandon,* 164 Wis. 387, 390, 160 N. W. 177.

By the Court.—Judgment affirmed.

WILL OF BILTY: MCCALL, Appellant, vs. BILTY, Respondent.

January 16—February 10, 1920.

Continuance: Absence of material witness: Discretion of court: Witness in military service in France: Witness having testified on former trial: Diligence in procuring testimony of absent witness: Failure to show when return of witness is expected: Appeal: Reversal of judgment because of refusal of continuance: Wills: Attorney's fees on appeal: Trial: Oral testimony on hearing of motion.

1. An application for a continuance of an action because of the absence of a material witness is addressed to the sound discretion of the trial court.
2. A judgment cannot be reversed because of the refusal of the trial court to grant an application for continuance, unless the court abused its discretion.
3. Where a case was on the calendar for two terms before an absent witness had entered the military service, and where no effort was made to take his deposition during such time or during the time he was in camp in this country, though he was one of the attorneys and had testified in the county court, an application for a continuance because of his absence in military service in France was properly denied for lack of diligence in procuring his testimony.

4. The continuance of a will contest case in the circuit court because of the absence of a witness was properly refused, where such witness had testified fully in the county court, such testimony being admissible in evidence upon the trial in the circuit court under sec. 4141*a*, Stats.
5. Where the action had been pending for two years in the circuit court, an application for continuance which did not indicate when the absent witness would return from France or when his testimony could be procured was properly denied, in the absence of a persuasive showing that justice would miscarry unless the continuance should be granted.
6. Oral testimony taken upon the hearing of a motion does not become a part of the record upon the mere certificate of the court reporter. Whether under any circumstances oral testimony is proper upon the hearing of an ordinary motion, *quære.*
7. Where the contestant of a will has acted in good faith in taking an appeal to this court, and the questions of law or fact involved are worthy of consideration, this court will order the costs taxed against contestant to be paid out of the estate.
8. Where proponent, on appeal from a judgment of the county court denying probate of the will, failed to appear in the circuit court or offer any testimony in support of the will, on appeal from a judgment dismissing such appeal he was not entitled to attorney's fees out of the estate, under sec. 4041*b*.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court dismissing an appeal from a judgment of the county court of Milwaukee county denying probate of the will of Jennie Bilty, deceased. The appeal from the county court to the circuit court was perfected in November, 1916, and the cause was on the circuit court calendars for the January, April, and July, 1917, terms, and thereafter until the 9th day of January, 1919, at which time the proponent of the will made an application for a continuance on the ground that John Devos, a member of the law firm representing the proponent, and the one who drew the will, was a material witness, and that he was at that time in the military service of the United States, in France, and his attendance could not be procured at the trial. The court denied the applica-

tion for a continuance. The matter was reached for trial, and the proponent failed to appear or offer any testimony in support of the will. Whereupon the court entered judgment dismissing the appeal and remitting the case to the county court with directions to proceed as provided by law. The proponent appealed from that judgment.

The cause was submitted for the appellant on the brief of *McGovern, Hannan, Devos & Reiss* of Milwaukee, and for the respondent on that of *L. A. Zavitovsky,* attorney, and *W. H. Churchill,* of counsel, both of Milwaukee.

OWEN, J. Appellant contends that the judgment should be reversed because the circuit court erred in denying her application for a continuance of the case over the term. The application for a continuance, by reason of the absence of a material witness, is addressed to the sound discretion of the trial court. *Schamper v. Ullrich,* 131 Wis. 524, 111 N. W. 691; *Miller v. State,* 139 Wis. 57, 119 N. W. 850. The judgment cannot be reversed, therefore, unless the trial court abused its discretion in refusing to grant the application.

The application was properly denied for the following reasons:

1. There was no showing of diligence to procure the testimony of Mr. Devos. The case was on the calendar at the January and April terms of the circuit court for the year 1917. Mr. Devos was one of the attorneys for the proponent. He entered the military service in May, 1917, from which time until August 15, 1917, he was at Fort Sheridan. During this period he was in Milwaukee frequently. No effort was made to take his deposition for use upon the trial, but, knowing that the cause was on the calendar and in due course would be reached for trial, the witness was permitted to leave Fort Sheridan and go to France without the least effort on the part of proponent or her attorneys to secure his deposition for use upon the trial.

2. Mr. Devos testified fully upon the trial of the matter in the county court. A perusal of the testimony there given leaves the impression that he testified fully concerning the competency of the testator and as to all circumstances attending the execution of the will. His testimony given at that trial was admissible in evidence upon the trial in the circuit court. Sec. 4141*a*, Stats. In addition to the authority of that section, the contestants offered to stipulate that his evidence given in county court might be read in evidence upon the trial in the circuit court.

3. At the time of the application for continuance the cause had already been pending two years in the circuit court. The showing made on the application for the continuance did not indicate when the absent witness would return from France or when his testimony could be procured. The matter having been pending for so long a time should not have been continued by the circuit court except for very cogent reasons and a persuasive showing that justice would miscarry unless the continuance be granted. This did not appear. In fact, no statement was made as to what evidence Mr. Devos was expected to give that was not given by him upon the hearing in county court, in which respect Circuit Court Rule XIX was not complied with.

4. Circuit Court Rule XIX requires an application for continuance to be based upon an affidavit by the party or some person who knows the facts, setting forth specifically the facts upon which the motion is founded. No such affidavit was filed in this case. Upon the hearing of the motion one of the attorneys for the proponent was sworn in open court. The testimony given by him appears in the record over the certificate of the court reporter. It is not even signed by him. We know of no rule or statute constituting testimony, given upon a motion of this kind, a part of the record upon the mere certificate of the court reporter. A doubt was expressed by this court in *Sweet v. Modern Woodmen,* 169 Wis. 462, 172 N. W. 143, as to the

propriety of receiving oral testimony upon the hearing of an ordinary motion, and one of the objections to such procedure is that there seems to be no way provided by which the testimony so given may be made a part of the record so that it can be reviewed upon appeal. However, we again reserve the question, preferring to withhold a definite decision thereof until it shall be necessarily involved and we have had the benefit of full argument thereon. Treating the record as properly before us, we think that the trial court rightly disposed of the motion for continuance upon its merits.

We are asked to order the costs and attorney's fees of the proponent upon this appeal to be paid out of the estate. "The established rule is, where the contestant of a will has acted in good faith in taking an appeal to this court, and the questions of law or fact involved are worthy of consideration, to order the costs taxed against such contestant paid out of the estate." *Jones v. Roberts,* 96 Wis. 427, 433, 70 N. W. 685, 71 N. W. 883; *Davis v. Davis,* 132 Wis. 54, 111 N. W. 503, 1129; *Will of Bierke,* 132 Wis. 165, 111 N. W. 1128. The same discretion is vested in this court with reference to attorney's fees by sec. 4041*b,* Stats. We do not think the discretion should be exercised, however, where the judgment or order appealed from was so clearly right as in this case.

By the Court.—Judgment affirmed.

KASHUDA, by guardian *ad litem*, Appellant, vs. ADAMS EXPRESS COMPANY, Respondent.

January 17—February 10, 1920.

Negligence: Driver requesting boy to climb on wagon: Failure to hitch horse properly: Contributory negligence of boy: Contributory negligence of parents.

1. Where the plaintiff, nearly eight years old, climbed up on one of defendant's wagons and was injured when the horse became frightened and ran away, and there was evidence that the driver asked plaintiff to put an empty feed bag in the wagon and that the driver left the horse unhitched and went away, the court properly refused to set aside findings of the jury that defendant was negligent and that such negligence was the proximate cause of the injury.
2. Where the danger is remote and not so obvious as to be easily appreciated, it is usually a question for the jury whether a child appreciated the danger to such an extent as to be responsible for its conduct.
3. The act of the boy in climbing on the wagon at the driver's request is *held* not contributory negligence as a matter of law.
4. It was not negligence as a matter of law for a mother and father, while both are at work, to leave the plaintiff, who was nearly eight years old, in the care of his fourteen-year-old sister in their home on an ordinary residence street. [Whether the negligence of the parents would be a bar to the plaintiff's action, not decided.]

APPEAL from a judgment of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Reversed.*

Action for personal injury. The driver of defendant's express wagon lived next door to plaintiff's parents. He was in the habit of driving his horse to the curb in front of his house at noon and feeding it oats in a box. On the day of the accident, August 14, 1917, he drove his horse to the curb and fed it oats. Plaintiff, a boy seven years and ten months old, got on the wagon, and while on the seat the horse became frightened, ran away, and the boy was injured.

The jury returned a special verdict finding (1) that the

defendant's driver did not use ordinary care in respect to hitching the horse at the time of the injury; (2) that he failed to use ordinary care in respect to keeping the boy away from the wagon; (3) that such failure found in questions 1 and 2 was the proximate cause of plaintiff's injury; (4) that the parents of the plaintiff used ordinary care to keep plaintiff away from defendant's wagon; (5) that plaintiff used ordinary care in climbing upon the wagon at the time of the injury; and (6) damages in the sum of $3,000.

Upon defendant's motion the court changed findings 4 and 5, to the effect that plaintiff and his parents were guilty of contributory negligence, and awarded judgment for defendant upon the verdict so amended, from which judgment the plaintiff appealed.

Arthur Breslauer of Milwaukee, for the appellant.

For the respondent there was a brief signed by *Quarles, Spence & Quarles,* attorneys, and oral argument by *Arthur B. Doe,* of counsel, all of Milwaukee.

VINJE, J. There was credible evidence from which the jury could find that the driver asked plaintiff to get the feed box from the yard; that he gave plaintiff the empty feed bag after he had put the oats in the box; that he told him to put the bag in the wagon; that the driver went into the yard before hitching the horse, and that plaintiff in obedience to the request to put the bag in the wagon climbed up on the seat and reached back to put the bag under or behind the seat, that being the place it was usually kept when empty; and that while he was so engaged the horse ran away and his leg was injured by the ankle being crushed between the wagon and a telephone pole.

The trial court refused to disturb the first three findings covering defendant's negligence and its proximate cause of the injury. It is urged by the defendant that the court erred in so doing because, in the absence of an invitation on

the part of the driver to put the bag in the wagon, no actionable negligence on its part is shown; if an invitation was given, the defendant cannot be charged with knowledge or the consequences thereof, citing *Miller v. Mead-Morrison Co.* 166 Wis. 536, 166 N. W. 315, and *Webster v. Corcoran Bros. Co.* 156 Wis. 576, 146 N. W. 815. In the former case the defect was a latent one, and it was held not chargeable to the defendant because the case was classed as one where a manufacturer puts out an article having a latent defect for which he is not responsible in the absence of knowledge thereof. This is no such case. In the latter case counsel mistakes the gist of the decision. There, as here, plaintiff had been directed by defendant's employee to do an act in the prosecution of his work, viz. straighten out a kink in a rope,—and it was held that defendant was liable because there was not only a breach of duty to keep plaintiff away, but "on the contrary there was an invitation to do the very thing which duty required ordinary care to prevent." Page 580. The court therefore properly refused to set aside the findings that defendant was negligent and that such negligence was the proximate cause of plaintiff's injury.

Can it be said as a matter of law that plaintiff was guilty of contributory negligence?

When the danger is obvious and easily appreciated by children of even tender years, this court has held them responsible for their conduct to practically the same degree that adults are, as in *Ryan v. La Crosse City R. Co.* 108 Wis. 122, 83 N. W. 770, where a boy eight years and nine months old attempted to cross in front of a moving street car; or as in *Ballard v. Bellevue A. Co.* 162 Wis. 105, 155 N. W. 914, where a girl eleven years old, contrary to orders, used an automatic elevator in an apartment building. But where the danger is more remote, latent, and not so obvious, it is usually a question for the jury to say whether the child appreciated the danger to such an extent that it could be held

responsible for its conduct. To the average boy, climbing upon a wagon to which a horse is hitched while it is feeding probably does not spell much in the way of danger, especially when the driver is near and has suggested if not directed the boy's act. The jury has said that such an act on the part of a boy seven years and ten months old is under such circumstances not negligence. We cannot say that such conclusion is wrong. *Ewen v. C. & N. W. R. Co.* 38 Wis. 613; *Secard v. Rhinelander L. Co.* 147 Wis. 614, 133 N. W. 45; *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60; *Webster v. Corcoran Bros. Co.* 156 Wis. 576, 146 N. W. 815. The probability of the horse becoming frightened and running away no doubt seems remote to a boy eager to sit on the driver's seat. To say that he does not appreciate such a danger to the same extent as an adult is reasonable. It is true that in this case the driver denied that he requested the plaintiff to bring the feed box or to put the empty bag in the wagon. On the contrary, he says he told him to keep away from the horse and the wagon. But the jury had a right to believe plaintiff's account of what took place. The court should not have disturbed the verdict as to plaintiff's freedom from contributory negligence.

Assuming, but not deciding, that the parents' negligence would bar recovery, the question arises, Were the parents negligent? They knew the boy was in the habit of playing around the horse and wagon and both had often scolded him for so doing, had forbidden him to do so, but had never punished him for disobedience of such orders. The father had remonstrated with the driver for letting his boy and other children play on and about the wagon. On the day in question the father was away at his customary work, and the mother was also away at work because of the necessity therefor. Plaintiff and his younger brother were left at home in the care of a fourteen-year-old sister. The stress of present economic conditions no doubt often puts the

earning capacity of the mother as well as that of the father to the test in order to support a family. Plaintiff's parents lived in a house surrounded by a yard in an ordinary residence street. To leave the boys there with a fourteen-year-old sister while the parents earned a livelihood does not constitute negligence as a matter of law as to the care of the children, even in view of the known propensity of plaintiff to play on or around the wagon. Parents cannot give their whole time to the supervision of their children, especially those under the necessity of earning a living. *Monrean v. Eastern Wis. R. & L. Co.* 152 Wis. 618, 140 N. W. 309. The jury could well say that the conduct of the parents measured up to that standard of ordinary care usually exercised by ordinarily careful and prudent parents under like or similar circumstances. Since the verdict as to the parents' lack of negligence finds support in the evidence, the court should not have set it aside, but should have entered judgment for plaintiff on the special verdict as returned by the jury.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff upon the verdict returned by the jury.

ULLMAN, Appellant, vs. AUSTIN, Respondent.

January 17—February 10, 1920.

Chattel mortgages: Bankruptcy of mortgagor: Assertion of claim against trustee: Action against third party for conversion.

An effort to recover from a trustee in bankruptcy certain brick for which plaintiff held a bill of sale, in effect a chattel mortgage, executed by the bankrupt, was not an election inconsistent with his right to sue defendant for converting other brick, also covered by the mortgage, prior to the bankruptcy proceedings.

APPEAL from a judgment of the circuit court for Milwaukee county: BYRON B. PARK, Judge. *Affirmed.*

Conversion. On January 15, 1916, the American Wrecking & Salvage Company gave to the plaintiff a bill of sale, in effect a chattel mortgage, upon 600,000 clean brick, then piled in the yards of the salvage company in what is known as the Eighth-street yard. On January 19, 1916, the salvage company executed to the defendant a bill of sale of 800,000 clean brick located in the yard between Fifth and Sixth streets, and also in the Eighth-street yard. On June 5, 1916, the salvage company was adjudged bankrupt and the trustee took possession of all its property. Proceedings were had in the bankruptcy court, and thereafter this action was begun against the defendant upon the theory that the defendant had converted the property covered by the bill of sale given by the salvage company to the plaintiff.

The jury found that on the 14th day of January, 1916, at the time of the execution of the bill of sale to the plaintiff, there were in the Eighth-street yard 300,000 clean brick; that the defendant took out of the Eighth-street yard 50,000 of the brick covered by the bill of sale to the plaintiff. The plaintiff moved the court to change the answer to the first question from "300,000" to "700,000," and for judgment on the verdict as so changed. The defendant moved to be allowed to amend his answer so as to set up by way of defense that the plaintiff had elected to rely upon his claim of ownership made by him in the bankruptcy proceedings, moved to change the answer to the second question from "50,000" to "Nothing," and for judgment in his favor. The trial court held that the proceedings in the bankruptcy court in no way affected the rights of the parties in this action, that the finding of the jury as to the number of brick in the Eighth-street yard covered by the bill of sale to the plaintiff was correct, and that the finding of the jury that the defendant had removed 50,000 of said brick from the yard was supported by the testimony, and gave the plaintiff judgment for 50,000 brick at $4 per thousand, with interest.

From the judgment plaintiff appeals, and the defendant served notice for a reversal under sec. 3049*a*, Stats.

For the appellant there was a brief by *Curtis & Mock* of Milwaukee, and oral argument by *H. K. Curtis.*

For the respondent there was a brief by *Clarke & Donnelly,* attorneys, and *John A. McCormick,* counsel, all of Milwaukee, and oral argument by *Mr. McCormick.*

ROSENBERRY, J. The main contention made by the plaintiff is that under the cases of *Dexter v. Cole,* 6 Wis. 320; *Cernahan v. Chrisler,* 107 Wis. 645, 83 N. W. 778; *Lucas v. Sheridan,* 124 Wis. 567, 102 N. W. 1077, and *Taylor v. Tigerton L. Co.* 134 Wis. 24, 114 N. W. 122, the defendant was guilty of conversion. It appears that the defendant sold some brick from the Eighth-street yard, and that he made some claim of title under his bill of sale to the brick located in the yard. The amount removed was found by the jury to be 50,000. There is no evidence to sustain the claim that the defendant wrongfully exercised any control over the brick, except those removed from the yard, which amounted to conversion thereof. No useful purpose would be served by a rediscussion of the law relating to the conversion of personal property, as it has been fully discussed in the cases cited.

The effort of the plaintiff to recover part of the brick from the trustee in bankruptcy cannot affect his right to recover against the defendant for the amount of brick removed by the defendant prior to the bankruptcy proceedings. Therefore defendant's motion based upon the theory that the plaintiff had made an election inconsistent with his claim in this case, so far, at least, as the recovery here is concerned, can have no effect, as it appears that the defendant removed the brick for which he is held liable prior to the bankruptcy proceedings.

By the Court.—Judgment affirmed.

TOWNS, Respondent, vs. TOWNS, Appellant.

January 17—February 10, 1920.

Divorce: Powers of courts: Final division of estate: Review or alteration of judgment after expiration of term of court: Husband and wife: Property awarded wife in final division of estate: Control by court.

1. Except for the power given to the court to open a judgment within one year after notice thereof for mistake or surprise, as provided in sec. 2832, Stats., a judgment in a divorce action, so far as it makes a final division and distribution of property, cannot be reviewed or altered after the term of court in which it was rendered.
2. Money awarded to the wife as a final division of estate, although payable in instalments, is her separate property.
3. The power given by sec. 2361 to the court in divorce actions to make, during the pendency thereof, orders concerning the support of the wife and the care and support of the minor children, and in relation to the parties or their property, does not warrant a court, after the term in which a final judgment was entered decreeing a final division of estate, in altering the decree as to the property awarded to the wife and relieving the husband from making payment of certain weekly instalments on the ground that the wife has become dissolute and is living in adultery with another man.
4. The express authority granted to the court by sec. 2374 to affect the status of the parties to a divorce action by subsequent revision or modification of the judgment, is a controlling indication that the legislature did not intend that the provisions of the judgment relating to a final division of property might also be altered without a modification of the status of the parties.
5. Divorce actions and proceedings therein are entirely statutory, and whatever the statute does not give the court cannot assume, however broad its equity powers in other matters may be.

APPEAL from an order and modification of a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed.*

On March 4, 1919, in the January term of the circuit court, a judgment was entered in the usual form, on plaint-

iff's motion, that the bonds of matrimony between the parties be wholly dissolved, and providing that the judgment, so far as it determines the status of the parties, shall not be effective, except for the purpose of appeal and review of the same, until the expiration of one year from the date of the entry thereof.

It further provided that the plaintiff pay to the clerk of the said circuit court, for and on behalf of the defendant and as trustee for her and as a "full, complete, and final division of the estate of the parties, the sum of $2,400," $1,000 thereof forthwith and the balance in monthly instalments of $50 to the clerk and by him to be paid in weekly instalments to the defendant, and secured such payments by lien on certain real estate.

After the entry of the judgment a term of court in that circuit commenced on the first Monday in April and another on the first Monday in July. Sec. 113.06, Stats.

In July, 1919, the plaintiff made application to have a revision of said judgment in so far as said judgment determines the final division of the estate of the parties. Such application was based upon a showing that in June, 1919, the defendant was convicted of vagrancy in the district court for Milwaukee county and sentenced to sixty days in the house of correction, and that at times subsequent to the entry of judgment the defendant had frequently been intoxicated and was living with another than the plaintiff as man and wife.

Such facts were uncontradicted, and upon the hearing of such application, the defendant appearing by counsel, an order was made to the effect that, whereas $1,000 had been paid under the judgment aforesaid, such sum should be a full, complete, and final division of the estate of the parties, and that the lien given in the judgment should be vacated. Thereupon, on July 29th, a further order, in form as a judgment, was entered by the clerk of the court providing that the judgment of March 4th requiring the payment of

$2,400 as a full, complete, and final division of the estate of the parties be modified and revised so that the said $1,000 so paid is a full, complete, and final division of the estate of the parties and that the lien theretofore granted be vacated.

From the order so directing and the judgment so modified defendant has appealed.

For the appellant there was a brief by *Curtis & Mock* of Milwaukee, and oral argument by *H. K. Curtis.*

For the respondent there was a brief by *M. H. Umbreit,* attorney, and *A. C. Umbreit,* of counsel, both of Milwaukee, and oral argument by *A. C. Umbreit.*

ESCHWEILER, J. Except for the power given to the court to open a judgment within one year after notice thereof for mistake or surprise as provided in sec. 2832, Stats., but within which this present application does not come, a judgment in a divorce action making a final division and distribution of the property as here cannot be reviewed or altered after the term of the court in which it was rendered. *Zentzis v. Zentzis,* 163 Wis. 342, 347, 158 N. W. 284; *Lally v. Lally,* 152 Wis. 56, 58, 138 N. W. 651; *Thompson v. Thompson,* 73 Wis. 84, 87, 40 N. W. 671; *Webster v. Webster,* 64 Wis. 438, 440, 25 N. W. 434; 14 Cyc. 793.

The property thus awarded to the defendant becomes her separate property. *Kistler v. Kistler,* 141 Wis. 491, 493, 124 N. W. 1028; *A. D. Baker Co. v. Booher,* 153 Wis. 319, 323, 141 N. W. 248.

The power given under sec. 2361, Stats., to the court in divorce actions to make, during the pendency thereof, orders concerning the support of the wife, the care and support of the minor children, and in relation to the parties or the property of the parties, as in its discretion shall be deemed necessary or proper, cannot be held to warrant the power here exercised by the court after entry of a final judgment.

In *White v. White,* 167 Wis. 615, 168 N. W. 704, relied upon by respondent in this case, the application was made, as here, subsequent to the judgment, but only with reference to so much of such judgment as determined the status of the parties. Under the provisions of sec. 2374, Stats., the court is granted express power to vacate or modify such judgment, so far as it affects the status of the parties, at any time within one year from the entry of such judgment, and if the judgment shall be so vacated it shall restore the parties to the marital relation that existed before the entry of such judgment. In that case, as an incident to the disposal of the question there at issue involving the status, it was held that the sum of money which had been voluntarily paid by plaintiff to defendant might still be controlled by the court. The distinction between the two situations is manifest.. The primary purpose of the divorce action is the adjustment of the status of the parties; the property interests are incidental thereto. *Damon v. Damon,* 28 Wis. 510, 514; *Clarke v. Burke,* 65 Wis. 359, 361, 27 N. W. 22.

If the primary purpose is necessarily altered or affected the incident may also be properly changed, but it by no means follows that the incident may be changed, as was done here, the primary being unaltered.

The express authority under sec. 2374, Stats., granted to the court to affect the status of the parties by subsequent revision or modification is a controlling indication that the legislature did not intend that the other provisions of the judgment might also be so altered. *Bassett v. Bassett,* 99 Wis. 344, 347, 74 N. W. 780.

The loud call that the facts shown in the application herein undoubtedly make for such a relief as was granted by the court below cannot, however, be a sufficient basis for the action taken. Divorce actions and proceedings therein are entirely statutory; what the statute does not give, the court, however broad its equity powers in other

matters may be, cannot assume. *Martin v. Martin,* 112 Wis. 314, 318, 87 N. W. 232, 88 N. W. 215; *Renner v. Renner,* 127 Wis. 371, 374, 106 N. W. 846; *Graham v. Graham,* 149 Wis. 602, 604, 136 N. W. 162; *Martin v. Martin,* 167 Wis. 255, 260, 167 N. W. 304.

By the Court.—The order of the circuit court and the modification of the judgment in July, 1919, is and are vacated and set aside.

STATE, Plaintiff in error, vs. MEEN, Defendant in error.

January 17—February 10, 1920.

Criminal law: Discharge of defendant for want of evidence: Writ of error by state to review order discharging defendant.

1. A writ of error does not lie by the state in a criminal case except pursuant to constitutional statutory provisions.
2. The effect of discharging an accused person for want of sufficient evidence is in legal effect the same as a verdict of acquittal by a jury or a verdict of acquittal directed by the court.
3. The discharge of an accused person by the court, either before or after verdict, for want of sufficient evidence—in legal effect the same as an acquittal—is not reviewable by writ of error on the application of the state, under sec. 8, art. I, Const., relating to putting twice in jeopardy.
4. The court may discharge a defendant for want of evidence, and such an order is final and not reviewable under sec. 4724*a*, Stats.

ERROR to review an order of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Writ quashed.*

The writ was prosecuted by the state to review an order entered July 12, 1919, arresting judgment after verdict of guilty and discharging the defendant in error for want of evidence to sustain the verdict of the jury.

The defendant was charged with having violated the statutes, sec. 1791*n*—1 and 1791*n*—2, in that while engaged in the business of buying cream and butter fat for the purpose

of manufacture he did wilfully, knowingly, and intentionally, for the purpose of creating a monopoly and of destroying the business of a competitor in the village of Hatley, Marathon county, discriminate between the different sections, communities, towns, villages, and cities of the state by buying cream and butter fat at a higher price in the village of Hatley than he then paid for the same commodity in the town of Franzen in the same county, due allowance being made for the difference in cost of transportation from point of purchase and place of manufacture.

Four charges were preferred against the defendant for violating this statute in the month of October, 1918. The case was tried to the court and a jury. The jury on June 26, 1918, rendered a verdict finding the defendant guilty on each of the four counts in the information. The defendant, after verdict, moved in arrest of judgment, and that notwithstanding the verdict the information be quashed and defendant discharged upon the grounds (1) that the warrant states no offense known to the law; (2) that the statutes on which the complaint is based are unconstitutional and void; (3) that the state has offered no evidence sufficient to show, or tending to show, a violation by defendant of the law as charged in the information, and in the alternative, if this motion be denied, the defendant moved for a new trial for manifest errors, specified in the motion. The court passed on the first motion, holding that the statute, sec. 1791*n*—1, is not obnoxious to the constitutional objection as claimed by defendant. The court, however, determined that the defendant's motion excepting to the sufficiency of the evidence to sustain the verdict in any reasonable view thereof was well taken, and held that the defendant's motion "to arrest judgment on the verdict and to discharge the defendant must be granted." The record shows that the defendant, at the conclusion of the testimony and before the case was submitted to the jury, made a motion to direct a verdict of acquittal, that the information be

quashed, and that the defendant be discharged. The court in ruling on this motion stated:

"I am going to take the advice of this jury and then I shall determine all the questions raised. I want to have the state in position to review this case before the supreme court if it should be necessary. We can do that by taking the verdict and then considering the motion in arrest of judgment."

The court then denied the motion without prejudice to the right to review the same question by motion in arrest of judgment, after the verdict.

For the plaintiff in error there were briefs by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *George W. Lippert,* district attorney of Marathon county, and oral argument by *Mr. Messerschmidt.*

For the defendant in error there was a brief by *Harry L. Reevs* of Rhinelander and *Olin, Butler, Stebbins & Stroud* of Madison, and oral argument by *Harry L. Butler* and *Byron H. Stebbins.*

SIEBECKER, J. The defendant's motion after verdict, among other things, demanded the discharge of the defendant on the ground that the evidence is insufficient to warrant the conviction of defendant of the offenses charged in the information. The record is also clear that the defendant insisted on his discharge by asking the court to direct a verdict of acquittal at the conclusion of all the testimony in the case. It is manifest that the defendant insisted that no case had been made against him and that the court direct that he be discharged from further prosecution in the case. This is the effect of the proceedings in the trial court. In the light of this state of the case, is the state entitled to prosecute a writ of error to review the case in this court? Writs of error do not lie at the suit of the state unless they are provided for by statutes which are constitutional, under the provisions of sec. 8, art. I, Const., which provides: "No

person, for the same offense, shall be put twice in jeopardy of punishment." *State v. Kemp,* 17 Wis. 669; *State v. Martin,* 30 Wis. 216; *State v. Grottkau,* 73 Wis. 589, 41 N. W. 80, 1063.

There can be no dispute but that defendant was put in jeopardy before the motion for discharge for insufficiency of evidence could be made. The effect of discharging the defendant for want of sufficient evidence is in legal effect the same as a verdict of acquittal by jury or a verdict of acquittal directed by the court. Such a discharge by a court of competent jurisdiction is not reviewable by writ of error on the application of the state. *State v. Grottkau,* 73 Wis. 589, 41 N. W. 80, 1063; *Schultz v. State,* 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571.

Sec. 4724*a,* Stats., does not provide for a review of the order made in this case, because the order is in substance and effect one discharging the defendant for want of evidence. It is not merely an order in arrest of judgment. That the court had the right to make such an order and that it is final in the case is recognized in this state. *Ohms v. State,* 49 Wis. 415, 5 N. W. 827; *Prinslow v. State,* 140 Wis. 131, 121 N. W. 637; *Gerke v. State,* 151 Wis. 495, 139 N. W. 404; *Devoy v. State,* 122 Wis. 148, 99 N. W. 455.

By the Court.—The writ of error is quashed.

WINSLOW, C. J., and KERWIN and OWEN, JJ., took no part.

APPLICATION OF KAISER.

May 29, 1919—March 9, 1920.

Railroads: Highway crossings in cities: Subways: Streets on boundary line between town and city: Expense of separation of grades: Eminent domain: Elements of damages: Highway crossing railroad tracks: Compensation: Parties entitled.

1. Sub. 48, sec. 3, ch. IV, of the Milwaukee city charter (Laws 1874, ch. 184), authorizing the common council to require railroad companies to construct viaducts at highway crossings, prohibits the city from assuming expense in connection with such work though the railroad is the senior way.
2. The damages to which a railroad company is entitled for the opening of a highway across its road do not include the cost of constructing a subway pursuant to said sub. 48 of the city charter.
3. The state may require the separation of grade crossings as a matter of police regulation, and place the burden on the railroad or the municipality, or apportion it as it sees fit.
4. A railroad company accepting a city ordinance and constructing a subway under its right of way cannot urge that at the time the ordinance was passed the street had been abandoned, under sec. 1294, Stats., in order to defeat liability for damages to property owners.
5. Sub. 48, sec. 3, ch. IV, of the Milwaukee city charter is construed to authorize the common council to require a railroad company to construct a subway at the time a street is first opened to travel.
6. Under said sub. 48, an ordinance requiring the construction of a subway was *ultra vires* so far as it placed the expense of the construction of the approaches on the city, and must be treated as an order to the railroad company to do the work at its own expense.
7. A railroad company required to separate grade crossings under said sub. 48 must compensate the owner of the property taken in consummating the separation.
8. Where the boundary between a city and a town was the middle of a street, the city had the same power to compel a railroad company to construct a subway under its right of way in the part of the street within the city limits that it would have to compel it to do so on any other street in the city, the town having agreed to the improvement.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Condemnation proceedings by the owner of certain lots abutting on Oklahoma avenue in the city of Milwaukee for the recovery of damages occasioned by the cutting down of the street in front of said lots to bring it to the level of a subway under the tracks of the *Chicago & Northwestern Railway Company*. From an order appointing commissioners the railway company appealed.

The facts disclosed by the petition and the answer of the railway company are as follows: The center of Oklahoma avenue, a section line, forms the boundary between the city of Milwaukee and the town of Lake in Milwaukee county. It is sixty-six feet in width. The tracks of the defendant railway company cross said Oklahoma avenue. The railroad was constructed in 1854. In March, 1887, by virtue of a recorded plat, that portion of Oklahoma avenue lying north of the section line and east of the railroad right of way was dedicated as a highway. In 1886 the land south of the section line and east of the right of way was platted and the south thirty-three feet of Oklahoma avenue was thereby dedicated as a highway. The first highway crossing Oklahoma avenue west of the right of way is Clement avenue. Prior to 1895 no highway had been dedicated or laid out on said section line from the east line of the right of way to said Clement avenue. West of Clement avenue, however, a highway corresponding to Oklahoma avenue had been in use for many years.

In August, 1895, the city of Milwaukee and the town of Lake by joint action laid out a public street or highway sixty-six feet in width extending from the east line of the right of way west on said section line to the east line of Clement avenue. This highway so laid out, however, was never opened or used prior to October, 1911. It was provided by the order laying out this highway that the city of Milwaukee should make and keep in repair the north half thereof and the town of Lake the south half.

In July, 1905, the railway company made application to

the city of Milwaukee for permission to lay down and operate two additional tracks across certain streets in said city, including Oklahoma avenue. On October 16, 1905, the city council adopted an ordinance granting such permission upon condition that the railway company construct subway crossings at Kinnickinnic avenue and Pryor avenue, said avenues lying to the north of said Oklahoma avenue. It recited also the proceedings of 1895 laying out Oklahoma avenue, that proceedings for putting said avenue in condition for public travel in future were probable, and that said tracks would extend across said Oklahoma avenue, and required the railway company to construct and maintain a subway for said Oklahoma avenue, where the same is crossed by said tracks, within five years from March 1, 1906, provided that within that time the proper municipal authorities shall have put said Oklahoma avenue in condition for public travel and shall have completed the excavation for said subway up to the right of way on each side: "It being understood and agreed that said *Chicago & Northwestern Railway Company* shall bear the entire cost of said subway within its right of way, and shall be at no cost or expense for any work outside of its right of way or for damages resulting from any work done outside of its said right of way." It was further provided that the railway company should not at any time be required to construct said subway while a public highway existed across its right of way at Rusk avenue. This ordinance was duly accepted by the railway company. In 1908 the city of Milwaukee established the grade of Oklahoma avenue, taking the street under the tracks of the railway company, which grade was also established by the town of Lake. The city of Milwaukee cut and graded Oklahoma avenue during the year 1908, and the town of Lake in 1910, up to the right of way of the railway company, and during the year 1911 the railway company excavated across the right of way to the grade so established by the city and town, completing the

work in October, 1911. There was never any travel on Oklahoma avenue across said railroad tracks at grade. The petitioner owns lots located on the Milwaukee side of Oklahoma avenue and abutting thereon, from which material was taken in forming the approach to the bottom of the subway.

R. N. Van Doren of Milwaukee, for the appellant.

For the respondent there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *Henry H. Otjen.*

The following opinion was filed November 4, 1919:

OWEN, J. The petitioner brings these proceedings on the theory that the soil removed from Oklahoma avenue, in making the approach to the grade of the subway under the railway tracks, was taken for railroad purposes. The railway company contends that the soil was taken for municipal purposes and that it is under no obligation to pay for the removal of the soil outside its right of way. The question to be determined, therefore, is whether the removal of the soil was for a railroad or municipal purpose. The charter of the city of Milwaukee (Laws 1874, ch. 184, subch. IV, sec. 3, sub. 48) confers upon the city council power "to require railroad companies to construct and maintain at their own expense, such bridges, viaducts, tunnels, or other conveniences, at public railroad crossings, as the common council may deem necessary." In *Superior v. Roemer,* 154 Wis. 345, 356, 141 N. W. 250, similar language in the Superior charter was held to prohibit the city from assuming expense in connection with such work. Commenting on the similar provision of the charter of the city of Superior it was said:

"This provision amounts to a prohibition. Where the charter provides for building at the expense of the railway companies and no other authority is conferred, the city cannot authorize building in the manner prescribed at the city's expense. It could not by indirection defeat the provisions of the charter."

This case must be ruled by that decision, unless it can be distinguished in substantial particulars so as to make the doctrine of the *Superior Case* fundamentally inapplicable here. It is true that in the *Superior Case* the street or highway was the senior way, while here the railway is the senior way, and we must consider whether this fact makes a different rule applicable. In the *Superior Case* the fact that the street was the senior way was given some prominence. But it is clear that the decision did not rest upon that fact alone. It was mentioned rather for the purpose of reinforcing the conclusion reached than furnishing a foundation therefor. In the opinion it is said:

"If a city should lay out a new public highway across the switch tracks and yard of a railroad, the city thereby creating the necessity of the viaduct or subway, *and there was no statute fixing the burden,* there might be some force in the claim that the city should bear the burden or some part of it."

It will be noticed that this concession couples two contingencies, one being that the railway is the senior way, the other being the absence of any statute imposing the burden of such construction upon the railroad company. A consideration of the entire opinion leaves no doubt that the decision was rested upon the provision of the city charter conferring upon it power to require railroad companies to construct subways or viaducts at public crossings, such provision at the same time depriving the city of any power to contribute to the expense of such undertakings. It was also pointed out that

"It is perhaps true that sec. 1836 [requiring a railroad company upon crossing a highway to restore such highway to its original state of usefulness] is not strictly applicable to viaducts and subways, but in connection with the provisions of the city charter quoted it is significant in determining upon whom the burden shall rest in cases like the present, where an old way is occupied by a new way."

These expressions taken from the opinion in that case make it plain that the fact that the street was the senior way was not controlling in reaching the conclusion there announced. Of course the situation there presented was such that the question of which was the senior way could be made use of to fortify the conclusion reached that there was no liability on the part of the city to contribute to the expense of the construction of the viaduct in question. The situation in this case is reversed. Concededly the railway is the senior way, and it is urged that instead of being required to restore the highway to its original state of usefulness it is entitled to damages because of the laying out of the highway over its right of way. That a railroad company is entitled to certain damages under such circumstances was decided by this court in *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118. Damages to which it is entitled, however, do not include elements arising from compliance on its part with police regulations prescribed by state law. This is emphatically stated in the case referred to. That the separation of grade crossings is a matter of police regulation which the state may require in the interest of the safety of public travel and place the burden incident to the accomplishment thereof upon the railroad or the municipality, or apportion it as it may see fit, is settled by *Polk v. Railroad Comm.* 154 Wis. 523, 143 N. W. 191, and *Milwaukee v. Railroad Comm.* 162 Wis. 127, 155 N. W. 948. It is pointed out in *Chicago, M. & St. P. R. Co. v. Milwaukee, supra,* that sec. 1836 creates two classes of highway crossings: one where the responsibility for their maintenance, as between the railway company and the municipality within which they are located, is on the former, and the other where such duty is on the latter. Because sec. 1836 requires a railroad to restore a highway to its original state of usefulness only when the railroad crosses the highway, it seemed to follow that

when the highway crosses the railroad the railroad is entitled to damages. In other words, the provisions of sec. 1836 are responsible for the rule laid down in the *Milwaukee Case, supra,* to the effect that a railroad is entitled to damages when an ordinary highway is laid across its right of way.

The legislation embodied in sec. 1836 must not be confused with legislation providing for the separation of grade crossings. Sec. 1836, in effect, has been upon our statute books from the very beginning of the state. That section requires no more than that the railroad company when crossing a highway shall restore the highway to its original state of usefulness, or, as held in the *Milwaukee Case, supra,* that the railroad company is entitled to damages when a highway is laid out across its right of way. Manifestly that legislation has reference to the ordinary grade crossing. The requirement that the railroad company shall restore the highway to its original state of usefulness does not contemplate a subway or viaduct, unless that be necessary owing to the topography of the *locus in quo* to restore it to its former state of usefulness. In the early days, when sec. 1836 was first enacted, the separation of crossings was little thought of, if at all. That idea has come with time and development, which have brought increasing population, activities, and traffic, multiplying the dangers incident to crossings of highways and railway tracks at grade. This has given rise to a new field of legislation. Legislation looking towards the separation of grade crossings deals with a distinct subject, and is prompted by special reasons. The requirement that the highway shall be restored to its original state of usefulness was to the end that travel might proceed in its accustomed way. Legislation looking towards the separation of grade crossings springs from the necessity of making such places which, by the increase of population and traffic, have become dangerous, safe for public travel. The circumstance which arouses

the power is the existence of a dangerous crossing. It matters not whether the crossing resulted from a railway crossing a highway or a highway crossing a railway. The mere fact that the crossing, no matter how or when created, constitutes a menace to the safety of persons and property engaged in public travel authorizes the state, in the exercise of its police power, to provide for the elimination of the danger. So that in considering where the burden is placed in the matter of accomplishing a separation of grade crossings we are not aided by a reference to sec. 1836 or decisions based thereon providing that highways shall be restored to their original state of usefulness, or that where the railroad is crossed by a highway it shall be entitled to damages.

The railway company insists, however, that the construction of the subway was not in the nature of a separation of crossings, and the situation in this respect should receive attention. At the time of the adoption of the ordinance in question Oklahoma avenue had not been opened up. It had been laid out by proceedings had for that purpose in 1895. It is contended by the railway company that by virtue of the provisions of sec. 1294 providing that "Every public highway already laid out or which shall hereafter be laid out shall cease to be considered a public highway at the expiration of four years from the time when it was so laid out, except such parts thereof as shall have been opened, traveled or worked within such time, . . . shall be considered legally discontinued," the proceedings laying out the highway had become nugatory long before the enactment of the ordinance of 1905. This, however, was not insisted upon by the railway company at the time of the passage of the ordinance or the digging of the subway, and all concerned, the railway company, the city, and the town, evidently treated the proceedings as subsisting, legal, and valid, and the railway company is not in any position at this time to urge that the highway laid out in 1895 was abandoned either in 1905 or 1911. Besides,

it is provided in sec. 1295, Stats., that "All highways which shall have been laid out by the supervisors of any town, . . . any portion of which shall have been opened and worked for the term of three years shall be deemed to be and are hereby declared to be legal highways so far as they have been so opened and worked, notwithstanding the law may not have been in all respects complied with in laying out the same." That Oklahoma avenue is a public street cannot well be questioned at this time. The terms of the ordinance reciting the proceedings laying out Oklahoma avenue, the acceptance by the railway company of its terms, the digging of the subway on its right of way,—all indicates that the railway company acquiesced in the validity of the proceedings laying out the street or highway and cannot be permitted at this time to challenge their legality.

It is further argued that because there was no crossing at the time the ordinance was enacted, nor at any time prior to the digging of the subway, the digging of the subway was merely a part of the opening of the street and was not in response to a direction of the city council requiring a separation of grades. It is true that the provision of the city charter under consideration authorizes the common council to require railroad companies, at their own expense, to furnish such tunnels, viaducts, and other conveniences at public railroad crossings as the council may deem necessary. Taken literally, it would seem to require the existence of a public crossing before the power of the common council in this respect could be exercised. Such a construction would simply require the useless proceeding of first opening up a street over a railroad track. The day after it was opened the power of the common council would be unquestioned. Such a construction would approach absurdity. We construe the provision of the charter as authorizing the common council to exercise the power conferred whenever the opening up of a street is in contemplation, thus preventing unnecessary circuity and surplusage of effort resulting

from first opening up the street and making in truth and in fact a grade crossing.

We proceed with our consideration, therefore, upon the supposition that the construction of the subway under the railroad tracks on Oklahoma avenue was a separation of grades and not a mere opening up of the highway. In order to ascertain where the burden is placed, we must refer to the law relating to the separation of grade crossings, and we are not at all concerned with the correlative rights and duties resting upon the municipality and the railway company in cases of grade crossings. This brings us to a consideration of the force that should be ascribed to the ordinance passed in 1905. There is no question but that the work done by the railway company, the city, and town in the construction of the subway is referable to this ordinance. It is the contention of the railway company here that, because the ordinance laid upon the municipality the duty of bringing the street to grade from its natural surface to the bottom of the subway, the railway company was by the same token relieved of any liability in the premises. This must be conceded if the ordinance is to be accorded the force and status of a contract. But, as already seen, the city was wholly without power to assume any responsibility in the premises. It could direct and require the railway company to construct the subway, but such construction must be at the expense of the railway company under and pursuant to the charter provision heretofore quoted. The city itself could not agree to bear any part of the expense of the undertaking. Treated as a contract, therefore, we find that that portion thereof pretending to obligate the city for the grading of the street from the surface to the bottom of the subway was *ultra vires* and void. It being conceded that the subway was constructed pursuant to the terms of the ordinance, which was void as a contract, it can only be construed as a direction or an order of the common council to the railroad company to construct the subway pursuant

to the power conferred upon it by the charter provision above referred to.

The foregoing considerations bring this case squarely within the doctrine not only of *Superior v. Roemer,* 154 Wis. 345, 141 N. W. 250, but that of *Pabst B. Co. v. Milwaukee,* 157 Wis. 158, 147 N. W. 46, and *Eisler v. C., M. & St. P. R. Co.* 163 Wis. 86, 157 N. W. 534, in which latter cases it was held that, where the duty to separate grade crossings rests upon the railroad company, property taken in consummating the separation is taken for railroad purposes and must be compensated for by the railroad company. It follows that the taking here was a taking for a railroad purpose and, no compensation having been made for the property taken, the petitioner is entitled to maintain these proceedings.

By the Court.—Order affirmed.

The appellant, *Chicago & Northwestern Railway Company,* moved for a rehearing.

In support of the motion there was a brief by *R. N. Van Doren* of Milwaukee, attorney for the appellant.

In opposition thereto there was a brief by *Otjen & Otjen* and *John L. Newman,* all of Milwaukee, attorneys for the respondent *William F. Kaiser.*

The following opinion was field March 9, 1920:

OWEN, J. On a motion for rehearing appellant's attorney urges upon our attention an aspect of the case not heretofore presented or considered. He earnestly contends that because the authority of the city of Milwaukee ceases at the center of the street, and it neither had power to order the subway constructed on the town of Lake side of the street, or to destroy the street in a physical sense by constructing a subway on its side of the street and leaving the grade crossing on the town side, its charter powers, referred

to in the main opinion, could not be invoked to bring about the construction of the subway in question.

It may be conceded that the city had no jurisdiction of the town side of the street and that it could not physically destroy the street by digging a subway in its half thereof. But certain it is that the two municipalities, by agreement, could improve this street by the construction of the subway; that they did so agree, whether the agreement was express, implied, or by mutual acquiescence, is perfectly clear from the record in this case. The municipalities having agreed upon the nature of the improvement, the duty devolved upon each to prosecute such improvement upon its side of the street, and in doing so its power with reference to such improvement was exactly the same as in cases of improvements upon any other street within its boundaries. The city of Milwaukee had the same power to compel the railroad company to construct the subway in its part of the street that it would have to compel it to do so upon any other street in the city. The case does not present a situation where the city is seeking to destroy the street, or of forcing an improvement opposed by the town of Lake. If such were the case, the controversy would be between the city and the town. It would be doubtful if the railroad company could be heard to complain. In this case the city decided that its portion of Oklahoma avenue should be depressed so as to cross the right of way of the railroad company under its tracks. Upon such determination it became the duty of the railroad company to bear the burden of the undertaking just as though it were in a street over which the city had complete jurisdiction. That it was not the duty of the railroad company to construct the subway on the town side of the street does not relieve it of that duty on the city side.

By the Court.—Motion for rehearing denied.

APPLICATION OF DOSS and another.

May 29, 1919—March 9, 1920.

Railroads: Highway crossings in towns: Contract with town officers: Apportionment of expense: Damage to property owners.

Under sec. 1299*h*, Stats., authorizing town officials to agree with railroad companies regarding the construction of overhead or underground crossings, a railroad company is not liable for any of the expenses of construction of a subway unless it assumes such expenses by agreement with the town, and cannot be compelled to pay damages to an abutter on the street cut down to provide an approach to the subway.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Condemnation proceedings by the owner of certain lots abutting on Oklahoma avenue in the town of Lake, in the county of Milwaukee, for the recovery of damages occasioned by the cutting down of the street in front of said lots to provide an approach to the bottom of a subway under the tracks of the *Chicago & Northwestern Railway Company.* From an order appointing commissioners the railway company appealed.

R. N. Van Doren of Milwaukee, for the appellant.

For the respondents there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *Henry H. Otjen.*

The following opinion was filed November 4, 1919:

OWEN, J. This is a companion case to that entitled "In the matter of the application of William F. Kaiser for the condemnation of certain lands in the city of Milwaukee," *ante*, p. 40, 174 N. W. 714, 176 N. W. 781. A statement of the facts material to an understanding of this case will be found in the report of the *Kaiser Case.* The only difference between this case and that lies in the fact that the lots abutting on Oklahoma avenue, which were cut down to form the approach to the subway, are in the town of

Lake instead of in the city of Milwaukee. This seemingly trifling difference necessitates a different conclusion from that reached in the *Kaiser Case*. In the *Kaiser Case* it is held that the cutting down of the lots was for a railroad purpose, and that, as the owner of the lots had not been compensated for damages, the condemnation proceedings instituted were proper. The conclusion in the *Kaiser Case* that the taking of the lots or so much of them as lie within Oklahoma avenue was for railroad purposes, was based upon the provision of the city charter empowering the council to coerce the railway company to bring about a separation of public crossings. No such power is conferred upon towns by the statutes. The only power vested in towns to bring about a separation of grade crossings is found in sec. 1299*h*, Stats., which provides:

"Whenever any highway crosses any railroad and the supervisors of the town, trustees of the village or county board, in case of a county road, in which said highway and railroad are situated shall deem it for the best interest of the public that said highway shall be so constructed as to cross the railroad above or below the grade thereof, and agreement can be made between such supervisors, trustees or board and the owner or operator of such railroad as to the manner of constructing such crossing and doing the work necessary for its construction, they may contract together for the same; and such supervisors, trustees or board shall, after the execution of a contract therefor, assess upon the taxable property of the village, town or county, as the case may be, at the time and in the manner highway taxes are therein assessed, a tax sufficient to raise the amount required to carry out such contract on its part, which tax shall be collected at the time and in the manner other taxes are, and the money realized therefrom shall be set aside as a special fund to be used in paying for the work according to the terms of the contract as orders are drawn upon it by the proper authorities."

It will be seen that the town has no power to coerce the railway company to construct subways for streets or highways under its tracks. The only responsibility it can have

in such respect is such as it may voluntarily assume. In this case there was no contract between the railway company and the town of Lake. Assuming, however, that the terms of the ordinance of the city of Milwaukee, set forth in the *Kaiser Case,* defined the mutual responsibilities of the municipalities and the railway company, still the railway company has complied in full with the terms of that ordinance. There is therefore no foundation for the claim that the railway company is liable for damage done to the property involved in these proceedings, and they should be dismissed.

By the Court.—Order reversed, and cause remanded with directions to dismiss the proceedings.

A motion for a rehearing was denied, with $25 costs, on January 13, 1920.

DOBELIN, Respondent, vs. LADIES OF THE MACCABEES OF THE WORLD, imp., Appellant.

October 9, 1919—March 9, 1920.

Death: Presumption from absence: Not presumed that event occurred before end of seven-year period: Evidence as to survivorship.

1. In a husband's action against a fraternal beneficiary society to recover a benefit payable on the death of his wife, the evidence for the husband is *held* insufficient to meet the burden resting upon him to establish the necessary fact that the death of a brother of the wife, one of the beneficiaries named in the certificate, occurred before her death.
2. Unless the facts and circumstances shown are such as to warrant a reasonable inference that death took place at some particular time within the seven-year period limited by the presumption of death from absence, death is not presumed before the end of the period.

KERWIN, SIEBECKER, and VINJE, JJ., dissent.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The defendant, as a fraternal beneficiary association, issued a benefit certificate November 24, 1905, on the life of one Rose Josephine Ball Dobelin, then the wife of the plaintiff, for the sum of $500, payable within three months after satisfactory proof of her death to her therein named beneficiaries, Bernhard Paul Hanson and Wilhelm Otto Hanson, her brothers, to be equally divided between them. On its face this certificate appears to have been issued in lieu of a former certificate of January 10, 1900.

There is no question raised but that the plaintiff was entitled to the insurance if satisfactory proof was made that prior to the death of the insured March 9, 1916, her two named beneficiaries were then dead.

There was no direct proof of the death of either of said beneficiaries. The court found in effect that from the continued absence of the two brothers unheard from for a period of seven years, the death of each of them would be presumed; and furthermore, that it would be presumed to have taken place before the death of the insured, and that the plaintiff was therefore entitled to the amount of the policy. From judgment so finding the defendant has appealed.

For the appellant there was a brief by *Churchill, Bennett & Churchill* of Milwaukee, and oral argument by *W. H. Churchill.*

For the respondent there was a brief by *Gilbert & Ela* of Madison, and oral argument by *Emerson Ela.*

The following opinions were filed December 2, 1919:

ESCHWEILER, J. There is no question needing consideration in the disposal of this case other than whether the evidence was sufficient to warrant the conclusion of the trial court that the death of one of the brothers, Bernhard, took place prior to the death of the insured.

The testimony upon which such conclusion must rest, if it can be sustained, is in substance that these two brothers,

together with their sister, the deceased, and their mother, lived in the city of Madison until a few years prior to the marriage of plaintiff and deceased, which took place in 1903. The brothers and the mother moved to and lived in Watertown, South Dakota, and neither of the brothers had been in the city of Madison subsequent to such removal to South Dakota. The mother died in South Dakota, having remarried. Bernhard, while at Madison, worked in one of the hotels as bell-boy, and subsequently helped in a bar-room, and was not known to his family to have ever married. They were not in the habit of corresponding with their sister, and there would be intervals of years when she would receive no letter whatever from the brother, Bernhard, and apparently never from Wilhelm. Each could read and write. Their relations with the deceased and the plaintiff, their brother-in-law, were friendly. The latter had known the two brothers some ten or more years before his marriage.

After they left Madison the sister appears to have had a letter from Bernhard in 1906 to the effect that he had been "shanghaied" and taken to Russia and had traveled through other foreign lands. On June 27, 1911, the deceased received a telegram directed to her proper street and number in Madison reading as follows: "Must have fifty dollars before two days will repay in fifteen days telegraph," signed "Ben Wiber," and appearing to have been sent from Caliente, Nevada. (It appeared that Bernhard at times used the name Wiber instead of Hanson.) In response to such telegram the plaintiff on behalf of his wife sent the money. On the following day another telegram, directed as before, was received as follows: "Cannot identify myself have identification waived quick," signed "Ben Wiber." This was also done. No further communication whatever was received from Bernhard thereafter during the period that elapsed between such telegrams and the death of the insured, nor afterwards.

Depositions on behalf of plaintiff at Watertown, South Dakota, and Caliente, Nevada, were taken in July, 1918, being a period of fully seven years subsequent to the date of such telegrams. The witness in South Dakota knew these two brothers, their mother, and step-father, that they all had lived at Watertown for a number of years, that he had never been able to get any trace of either of the brothers in the past seven years, and had not heard from either of them for from seven to ten years. He did not know whether they had any friends or acquaintances in or near Watertown who would have been apt to have heard from them if they were still living. The testimony of the witnesses at Caliente, Nevada, was to the effect that each had lived there at Caliente twelve years or more, that it was a town of about 700 inhabitants, and none of them had ever known or heard of anybody there by the name of Ben Wiber, Ben Hanson, or Bernhard Paul Hanson, and some of them testified that if such an individual had lived there such witnesses would have known of that fact.

While it is conceded that the evidence in this case would be sufficient to support a finding that these brothers were dead at the time of the trial of this action in 1918, more than seven years having elapsed since the receipt of Ben's telegrams of June, 1911, yet it is contended by appellant that the facts are not sufficient to warrant the further conclusion that the death of Ben occurred prior to the sister's death on March 9, 1916, at a particular time within the seven years, but only some four years and nine months after such telegrams.

Unless the facts and circumstances shown in any particular case are such as warrant a reasonable inference that death took place at some particular time within the seven years, death is not presumed before the end of the period. *White v. Brotherhood of Locomotive Firemen,* 165 Wis. 418, 422, 162 N. W. 441; *Fidelity M. L. Asso. v. Mettler,* 185 U. S. 308, 319, 22 Sup. Ct. 662.

The grounds upon which the trial court arrived at the conclusion that the death of Bernhard occurred before the death of Mrs. Dobelin do not appear in the record other than as embodied in the findings.

Respondent claims that the facts of this case showing a former friendly relationship between the brothers and the sister; the knowledge of her street address by Bernhard as evidenced by his telegrams; the natural feeling of affection between them; the fact that no repayment of the loan was ever made by Bernhard in compliance with his promise to do so within fifteen days after his telegram; that no subsequent effort was made by him to obtain additional loans, although his application was so promptly met at that time; that he was unknown at Caliente, Nevada; and that he was never heard of again at Watertown, South Dakota, where he last had a home,—warrant a finding that his death was within a reasonable time after the telegrams and the receipt of the $50 and therefore within the four years and nine months intervening before the death of the insured.

We however cannot assent to a conclusion from any one of the above suggestions made by respondent, the facts in the case, or from all of them together, that Bernhard died within a short time after June, 1911. He and his brother were wanderers, with but the slightest of home ties, and those more naturally decreasing rather than strengthening as time went on. The failure of one so situated to keep his promise to repay the loan so easily obtained by him in response to his telegrams is certainly as fully as consistent with a theory of continued life, coupled with disability or disinclination to repay, as with an inference that such obligation of repayment had been abrogated by speedy death.

Under all the facts and circumstances we are reluctantly compelled to hold that the plaintiff did not meet the burden resting upon him to establish that the death of Bernhard occurred before the death of the insured, and it follows therefrom that the judgment must be reversed.

By the Court.—Judgment reversed, with directions to dismiss the complaint.

KERWIN, J. (*dissenting*). I cannot concur in the decision of this case. The absence of the two brothers of Mrs. Dobelin for seven years without tidings raises a presumption of death.

The only question remaining is whether Bernhard died before Mrs. Dobelin. The facts and circumstances shown by the evidence are in my opinion sufficient to warrant the court below in drawing the inference that Bernhard died before Mrs. Dobelin. *Miller v. Woodmen of the World,* 140 Wis. 505, 122 N. W. 1126; *Page v. Modern Woodmen of America,* 162 Wis. 259, 156 N. W. 137; *Whiteley v. Equitable L. Assur. Soc.* 72 Wis. 170, 39 N. W. 369.

I am authorized to say that Mr. Justice SIEBECKER and Mr. Justice VINJE concur in this dissent.

A motion for a rehearing was denied, without costs, on March 9, 1920.

LANGE and wife, Respondents, vs. HECKEL and another, Appellants.

November 6, 1919—March 9, 1920.

Conspiracy: Sufficiency of evidence: Degree of proof required: Circumstantial evidence proper: Proof of express agreement to defraud unnecessary: Not necessary to set out in verdict steps by which purpose was accomplished: Error to admit adverse examination as deposition: Appeal: Evidence construed in favor of party securing verdict: Erroneous admission of adverse examination: Harmless error: Instructions on immaterial issue.

1. In an action to recover damages resulting from a conspiracy to defraud, the evidence is *held* sufficient to support the jury's special verdict that two or more of the defendants had conspired to defraud plaintiffs through the exchange of real property.

2. To support an affirmative answer to the question whether defendants conspired to defraud, plaintiffs must establish the truth thereof by clear and satisfactory evidence to a reasonable certainty.
3. Proof of conspiracy almost *ex necessitate* must rest upon circumstantial evidence, direct proof of the illegal combination being generally locked within the breasts of the conspirators, so that the ultimate fact of the corrupt agreement must be inferred from established facts and circumstances. An express agreement between the defendants to defraud plaintiffs is not necessary, a tacit understanding to defraud being sufficient.
4. Upon an appeal from a judgment for plaintiff the evidence must be given every legitimate construction most favorable to his contentions.
5. The adverse examination of a party to an action under sec. 4096, Stats., is to enable the other party to obtain evidence, and is not the taking of a deposition to be used as evidence on the trial; and such evidence is not admissible when offered by the party testifying, although admissible when offered by the opposite party as evidence of admissions against interest.
6. Where the adverse examination of a party was wrongly admitted as his deposition, and he subsequently testified, and appellants had full opportunity of cross-examination but did not show any discrepancy between the testimony and deposition, the error was harmless.
7. It was not necessary that the jury in rendering a verdict against defendants should state whether they found them guilty of fraud in inducing the intoxication of plaintiffs, or for other reasons, where the conspiracy for which they were convicted was one to defraud.
8. Where four questions in a special verdict, if answered in plaintiffs' favor, made a case against the defendants, and a fifth question which was submitted had no place in the special verdict, the question whether the court properly instructed the jury in submitting such fifth question will not be considered.
9. Appellants are in no position to question the amount of damages allowed, where the record shows that such amount was practically agreed upon in open court by the attorneys for all parties.

ESCHWEILER, J., dissents.

APPEALS from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Affirmed.*

Action to recover damages resulting from a conspiracy.

The following facts are undisputed: The plaintiffs are husband and wife, of Polish nationality, unsophisticated in business transactions, speak the English language poorly and write it not at all. They owned a little forty-acre farm, situated about a mile from the village of Pulaski, which had been their home for a number of years. The defendant *Heckel* owned a two-story frame building in the village of Pulaski. For some time prior to the 21st day of June, 1915, this property had been listed with the defendant Dominiczak, a real-estate agent, for sale without success. On the morning of the said 21st day of June, *Heckel* told Dominiczak that if he did not dispose of the property that day he would place it in the hands of another real-estate agent. Dominiczak determined to trade the property for the Lange homestead, and called to his assistance the defendant *Passowicz,* who lived on a farm between three and four miles from Pulaski and at times worked with Dominiczak in making real-estate deals. About 3 o'clock in the afternoon Dominiczak drove out to the Lange homestead. *Mrs. Lange* was at Pulaski. He talked with *Lange* about a trade of the farm for the store property. *Lange* went to Pulaski with him. They met *Passowicz* and went into a saloon and had one or two drinks of whisky. *Mrs. Lange* was found and they examined the store building. *Heckel* joined the party and they talked trade. *Lange* said he would trade his farm, machinery, and personal property for the store building and $1,000 to boot. The five got into an automobile and went out to the farm, ostensibly to look over the personal property. At least four quart bottles of beer were taken along. The beer was consumed, the details of a trade talked over, a notary public was brought from Pulaski, and he prepared a contract by the terms of which the *Langes* were to trade the farm for the store property and $500 to boot. The deal was to be completed in thirty days, and if either party breached the contract $500 was to be paid to the other. To secure the payment of the $500

the *Langes* executed their note for that amount payable to Dominiczak and *Passowicz.* All papers were signed by the *Langes* by their marks. That night *Mrs. Lange* was so sick as the result of drinking the beer that a doctor had to be called. In the morning, after reading the contract, *Lange* immediately went to Pulaski and took the train for Green Bay to see a lawyer. Dominiczak, learning of this, hastened to Green Bay to see the lawyer (whom he knew *Lange* would consult) before *Lange* reached him. The lawyer declined to give *Lange* any advice and *Lange* returned home. Soon after his return home Mrs. Passowicz, wife of defendant *Passowicz,* called at the Lange place, and soon thereafter *Heckel* and Dominiczak drove up. They demanded immediate payment of the $500, threatened to sue the *Langes* if it was not paid, and threatened them with loss of their farm. After much discussion, a notary public was again brought out from Pulaski. *Lange* and his wife executed their note to *Heckel* for $300, secured by mortgage on the farm, and all papers previously executed were destroyed. *Heckel* sold the note and mortgage to the Seymour State Bank and divided the proceeds with Dominiczak and *Passowicz,* the latter receiving $70. Upon the maturity of the note foreclosure proceedings were instituted by the Seymour State Bank, which the *Langes* settled by giving a new note and mortgage for $469.

As already stated, the above facts appear without dispute. In addition to these facts the *Langes* claimed that the defendants represented that the store building at Pulaski rented for $35 per month. It is conceded that it did not rent for such amount, but defendants deny having made the representation. The *Langes* further claimed that they never agreed to trade for $500 to boot; that that provision of the contract was never agreed to by them, but was surreptitiously inserted. They further claimed that they never agreed to pay $500 in case of their failure to fulfil the con-

tract, and that they did not know that they were signing a $500 note to Dominiczak and *Passowicz*. They also claimed that they were so intoxicated by reason of drinking the beer and whisky furnished by the defendants that they were incapable of transacting business and did not know what they were doing.

The jury returned the following special verdict:

(1) That the defendants *Passowicz*, Dominiczak, and *Heckel* conspired to defraud plaintiffs; (2) that the defendants in carrying out said conspiracy secured from the plaintiffs the land contract in question; (3) that the defendants in carrying out said conspiracy and in furtherance of it secured from the plaintiffs the $300 note and mortgage in question; and (4) that the giving of the $300 note and mortgage in question was not agreed upon by the plaintiffs as a settlement in full of this cause of action.

Upon this verdict judgment was rendered in favor of the plaintiffs and against the defendants for the sum of $469, and from that judgment the defendants *Passowicz* and *Heckel* appealed. Dominiczak did not appear in nor defend the action.

Sol. P. Huntington of Green Bay, for appellant *Heckel*.

A brief was also filed for the appellant *Passowicz* by *Kaftan & Reynolds* of Green Bay.

For the respondents there was a brief by *Martin, Martin & Martin*, and oral argument by *Gerald F. Clifford*, all of Green Bay.

The following opinions were filed January 13, 1920:

OWEN, J. It is the major contention of appellants that the verdict is not supported by the evidence. The gist of the action is embodied in the first question of the special verdict, by which the jury found that two or more of the defendants conspired to defraud plaintiffs by securing the land contract in question. The answer to this question was

pursuant to an instruction that the burden of proof to support an affirmative answer was upon the plaintiffs to establish the truth thereof by clear and satisfactory evidence to a reasonable certainty. In view of the fraudulent object of the conspiracy, this was a correct statement of the degree of proof required of plaintiffs to establish their cause of action. Appellants challenge the sufficiency of the proof tested by this rule. The record has been examined with care, and we are satisfied that the conclusion of the jury is neither rash nor hazardous, but, on the contrary, is a very natural inference to draw from all the facts and circumstances disclosed by the evidence. We scarcely need refer to the fact that proof of conspiracy almost *ex necessitate* must rest upon circumstantial evidence. Conspiracy is a line of endeavor the success of which is not promoted by advertising. Direct proof of the illegal combination is generally locked within the breasts of the conspirators, and the ultimate fact of the corrupt agreement, if proved at all, must be inferred from established facts and circumstances.

Examining the facts and circumstances supported by the evidence, we find that the defendant *Heckel* was the owner of a store building in the village of Pulaski, in a more or less precarious state of repair and usefulness. He had been wanting to dispose of the property for some time, and had it listed for sale with the defendant Dominiczak, a real-estate agent, without results. Suddenly, on the morning of June 21st, so the evidence goes, *Heckel* told Dominiczak that if he did not sell or trade the property that day he would place it in the hands of another agent. This was a rather peremptory and brusque ultimatum, in view of the fact that there is a limited clientele for village property of this character. However, Dominiczak accepted the challenge and got busy. He laid his plans for an intensive campaign. The Lange farm was his objective. *Lange* had never manifested a desire or disposition to trade his farm, the only kind of property he had real use for, for a run-down village

store building for which he had no use whatever. But the redoubtable Dominiczak was not dismayed. He laid out his campaign. He called *Passowicz* to his assistance. *Passowicz* was a farmer living between three and four miles from Pulaski. He sometimes dickered in real estate and had helped Dominiczak in a few deals. Dominiczak needed his help then. *Passowicz* testified: "Dominiczak told me to come in. He told me '*Heckel* was going to trade the store.' He says: 'I have a nice little farm;' and he told me *Lange's* place." The record is silent as to the greeting extended *Passowicz* upon his arrival at Pulaski, or as to what instructions he received from Dominiczak, or the commission with which he was invested in carrying out the plan of campaign. That he was to play a responsible and important part in the offensive activities, however, may be inferred from the fact that he expected $75 for his day's work and was subsequently paid $70. We can judge of the plan of campaign agreed upon only by the subsequent happenings of the day. It seems that it contemplated an offensive against the Lange farm and, by a skilful deploying and arranging of forces, such an investment thereof as to compel the beleaguered ones to capitulate upon terms to be dictated by the offensive forces. Along in the afternoon, while *Mrs. Lange* was "down town," Dominiczak, casually like, dropped out to the Lange farm. He found *Lange* alone. In due course a trade was suggested. *Lange* was taken in the automobile and conveyed to town. They pulled up in front of a saloon. As a mere coincidence, *Passowicz* was there. *Lange* was taken inside and treated to whisky, one or two drinks. *Mrs. Lange* was found and the store was examined. They were told of its rental value and that they could make more out of the rent of the store than they could on the farm. *Heckel* appeared on the scene and talked trade with *Lange*. *Lange* wanted $1,000 to boot. *Heckel* said he would have to come down to $500. Whether he did or not is a matter of dispute. Anyway, *Heckel* wanted to

see the personal property on the farm. *Heckel,* Dominiczak, *Passowicz,* and the plaintiffs got into the automobile to go and see the personal property. At least four quart bottles of beer were taken along. The *Langes* say there were more. Just what the order of eventuations was after reaching the farm is somewhat in dispute. But this is certain: Wolski, a notary public and conveyancer at Pulaski, was brought to the farm; the beer was all drunk; the contracts were signed; the boot money was stipulated therein at $500; a note for $500 was given by the *Langes* to *Passowicz* and Dominiczak, to be paid in the event of their backing out. That night *Mrs. Lange* was so sick as the result of the liquor consumed that a doctor had to be called. The *Langes* claim that they were so intoxicated that they did not know what they were doing; that they never agreed to trade for $500 to boot, and that they did not agree to pay $500 to *Passowicz* in case they backed out, and, in fact, did not know that they had signed such a note. The *Langes* could neither read nor write and their signatures to the instruments were evidenced by their marks.

The next morning *Lange* discovered the nature of the contract and, without losing any time, proceeded to Green Bay to see a lawyer. The vigilant Dominiczak discovered *Lange's* movements and outdistanced him in a race to the lawyer. When *Lange* reached the lawyer, no advice, solace, or comfort was offered him. He was not told that Dominiczak had been to see him, or advised to consult another lawyer. He returned home. He found Mrs. Passowicz already there, extending comfort and consolation to his distracted wife, and soon thereafter the ubiquitous Dominiczak, with *Heckel,* appeared upon the scene. The purpose of the visit of *Heckel,* Dominiczak, and Mrs. Passowicz, as well as the spirit in which negotiations were resumed, is clearly revealed by the testimony of Dominiczak. He said:

"*Mrs. Lange* was in bed. She was not crying. I don't think she was sick. It was just a make-believe. She was

crying. I saw people cry that cry different from that. I think it was just a make-believe. About the $500, *Heckel* says: 'As long as you don't figure on making the trade, want to back out, you might just as well settle with me and pay me $500, because if you don't I will sue you for it.' "

Just what was said back and forth is not very clear, but the above testimony of one of the defendants may be relied upon to disclose their attitude. There is ample evidence for the conclusion that this unsophisticated old couple were cajoled and threatened with lawsuits and the loss of their farm, until, eventually, they gave their note for $300, secured by a mortgage on the farm, payable to *Heckel,* which *Heckel* sold and gave Dominiczak $150, $70 of which was paid to *Passowicz.*

We may concede, for the purposes of the argument, that these facts and circumstances do not warrant a finding that an express agreement was entered into between the defendants to defraud the *Langes.* But such an express agreement is not necessary:

"A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty, actionable combination. Individual intent by two or more persons to do an unlawful act or a lawful act by unlawful means is the first step in that regard. Next follows concurrence by such individuals, not concurrence of action, merely, . . . but concurrence in mental intent to effect the common purpose, each to aid the others in that regard. Mutuality in the undertaking may be secured without any express agreement and without a spoken or written word between the conspirators or a meeting of the members of the combine, or their, even, all knowing each other; or the precise thing to be accomplished or plans for its accomplishment, either in a general way or in detail, being distinctly stated by any member of the combine to any other member. If there is a meeting of minds, brought about in any way, to accomplish the common purpose, the essentials of a guilty combination are all satisfied." *Patnode v. Westenhaver,* 114 Wis. 460, at p. 474 (90 N. W. 467).

The somewhat unusual ultimatum of *Heckel* to Dominiczak to sell the property that day or he would place it in the hands of another agent, the calling of *Passowicz* to town, the selection of *Lange* as a likely customer, without prior negotiations or any prior indication that *Lange* entertained any thought of trading his farm for village property, the use of intoxicants, the misrepresentation as to the rent of the property, *Lange's* proceeding to consult a lawyer as soon as he discovered the nature of the contract, Dominiczak's watchful vigilance upon *Lange's* movements, the intuitive sensing of the nature of his errand to Green Bay, haste to frustrate his plans of securing legal advice, the timely call of Mrs. Passowicz at the Lange home, the immediate demand of settlement upon *Lange's* return, although, by the terms of the contract, they had thirty days in which to close the deal, the most unusual circumstance of the $500 note payable to Dominiczak and *Passowicz* in case of backing out, the fact that no effort was made to enforce the contract, together with a consideration of the ultimate result, by which the *Langes* were fleeced of $300 without a vestige of consideration moving to them, a division of the booty between the three defendants,—is all strongly persuasive of the conclusion that there was a tacit understanding between the defendants and a concurrence of mental intent on their part to effect the common purpose of defrauding the *Langes* by the procurement of the land contract in question. To our minds the verdict of the jury is abundantly justified by the evidence.

Lest it be thought that our treatment of the evidence is not entirely judicial and that we have indulged in fanciful inference and innuendo, it should be remembered that the evidence must be given every legitimate construction most favorable to plaintiffs' contentions, and we feel that the deductions we have made from the evidence are such as practical men of affairs might reasonably draw therefrom.

Before the trial *Lange* was examined adversely under the

provisions of sec. 4096, Stats. Upon the trial *Lange's* counsel offered his deposition, given pursuant to such examination, in evidence, and the same was received, over objection by the defendants. Later plaintiffs' counsel asked permission of the court to withdraw the deposition so read in evidence, which motion was granted, and *Lange* was placed upon the stand and testified. It is contended by the defendants that it was error to permit the reading of the deposition in evidence, which error was not cured by the fact that *Lange* was subsequently placed upon the stand. It is plain that the admission of the deposition in evidence was error. An adverse examination under sec. 4096 is not the taking of a deposition to be used as evidence upon the trial of the case. The object of such an examination is the obtaining of evidence for the party seeking the examination and against the party to be examined. It may be used in evidence by the party taking it against the party examined as original evidence of admissions made against the interest of the party examined. *Meier v. Paulus,* 70 Wis. 165, 35 N. W. 301. In this case it appeared that there was no reason why *Lange* could not be offered as a witness at the trial. As a matter of fact he was offered as a witness after his counsel had become fearful that his adverse examination was not admissible. We hold that, at least under such circumstances, the adverse examination of a party under the provisions of sec. 4096 is not admissible as evidence in his behalf upon the trial. Whether, if he were deceased, or for other reasons, his presence at the trial could not be secured, such an examination might be read in evidence, is not here involved and is not here decided.

The question now arises whether the withdrawal of the adverse examination or deposition, and the subsequent testimony of *Mr. Lange* upon the trial, cured the error of its admission. The rule obtains in this court that a reversal will not result from error occurring in the admission of evidence, or otherwise, unless it appears that a result more

favorable to the appellant might probably have prevailed had the error not occurred. *Bell v. Milwaukee E. R. & L. Co.* 169 Wis. 408, 172 N. W. 791; *Braun v. M., St. P. & S. S. M. R. Co.* 170 Wis. 10, 172 N. W. 743. In order to justify a reversal of the case because of this error there must be some reason to suppose that had the adverse examination not been read in evidence a different verdict would have been returned. No effort is made on the part of appellants to point out any discrepancies between the evidence given by *Mr. Lange* upon the trial and that given in the adverse examination, to indicate that the jury might have been unduly influenced by the reading of the adverse examination in evidence. Unless by reading the adverse examination to the jury evidence of a persuasive character was placed before them which was not brought to their attention in any other way, or which *Mr. Lange* failed to testify to upon the trial, it is not apparent how the verdict of the jury could have been prejudicially influenced. No claim is made that the testimony of *Mr. Lange* upon the adverse examination was materially different from his testimony upon the trial. The appellants had full opportunity for cross-examination if such discrepancy did occur, and it is quite plain that some such incident should be pointed out if the case is to be reversed for that error, under the rule obtaining in this court above stated.

The defendants requested the court to include in the special verdict questions tending to elicit the character of the fraud perpetrated by them upon plaintiffs in the procurement of the land contract, such questions requiring the jury to find whether the defendants caused plaintiffs to become so intoxicated that they were incapable of making the contract in question; whether the contract and notes were procured by reason of such intoxication; whether they fraudulently made the contract and notes so as not to contain the oral agreement of the parties, by providing for the payment of $500 in case of withdrawal, and by making the

amount of the boot money $500 instead of $1,000. It is the contention of the defendants that they have a right to know whether the jury united in convicting them upon any one of these alleged charges, and they point out that some of the jury might have been of the view that the fraud consisted in inducing the intoxication of the plaintiffs, while others might have thought that it resulted from their infidelity in reducing the oral agreement to writing. There would be much force in this contention if it were not for the fact that the conspiracy of which they were convicted by the verdict of the jury is a conspiracy to defraud. It is a conspiracy to do an unlawful act, namely, to defraud the plaintiffs. The result of their operations having accomplished this purpose, the question of the steps taken and the methods pursued in the course of the conspiracy, which was an unlawful one, is immaterial, and we think the trial court properly declined to include the questions requested in the special verdict.

Exception is also taken to certain instructions given by the court in connection with the fifth question of the special verdict, to wit: Was the giving of the $300 note and mortgage in question agreed upon by the plaintiffs as a settlement in full of the cause of action? We do not think this question had any place in the special verdict. The first four questions made a complete case against the defendants. The cause of action resulting from the facts and circumstances found by such first four questions manifestly could not be settled by the giving of the $300 note and mortgage. The giving of that note and mortgage was the ultimate fruits of the conspiracy and they were the immediate instruments which brought damage to the plaintiffs and made their cause of action complete against the defendants. Of course it was the defendants' theory that the giving of the $300 note and mortgage was a settlement by the plaintiffs for their breach of the land contract. That idea, however, is completely negatived by the answer to the fourth question of the special verdict, where it is found that the defendants,

in carrying out their conspiracy and in furtherance of it, secured from the plaintiffs the $300 note and mortgage in question. For this reason we find it unnecessary to consider whether the court properly instructed the jury in submitting the fifth question of the special verdict.

Judgment was rendered upon the special verdict in the sum of $469. It is claimed by the appellants that there was no warrant for rendering judgment in this amount. It will be noticed that the special verdict does not determine the damages sustained by the plaintiffs, and we confess that we were somewhat concerned as to the manner in which the amount of the damages was arrived at until we found, by reference to page 136 of the record, that this amount was practically agreed upon in open court by the attorneys for all parties. In view of this circumstance, appellants are in no position to question the amount of the damages.

We find nothing further requiring comment.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). The refusal of the trial court to submit as part of the special verdict the questions requested by defendants upon the issues raised by the answer and the evidence on material allegations in the complaint, was, in my judgment, a prejudicial, substantial denial of a right defendants are accorded by sec. 2858, Stats. *John E. DeWolf Co. v. Harvey,* 161 Wis. 535, 547, 154 N. W. 988; *Sadowski v. Thomas F. Co.* 157 Wis. 443, 451, 452, 146 N. W. 770; *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 216, 115 N. W. 865.

I think, also, that the form of the fifth question and the charge of the court upon it were each prejudicial error and that a new trial should have been granted.

A motion for a rehearing was denied, without costs, on March 9, 1920.

ESTES and wife, Respondents, vs. CROSBY and another, Appellants.

November 6, 1919—March 9, 1920.

Brokers: Real-estate agent: Principal agent liable for misrepresentations of subagent: Misrepresenting lowest amount owner would accept for lands: Good faith of subagent: Scope of employment: Authority of subagent.

1. A real-estate dealer having no binding agreement with an owner of land sufficient to give him a legal interest therein was necessarily the agent of the owner in negotiating its sale.
2. Where a real-estate agent placed land for sale with another agent, the latter was his subagent, but as to third persons he was also agent for the owner.
3. A real-estate agent who, in placing land for sale with a subagent, fixed the selling price, and, knowing that the subagent represented to purchasers that this was the lowest price the owner would accept, received the benefit of such representation, was chargeable with the damage to the purchasers from their reliance thereon.
4. Where the agent fixed the selling price of the land and gave it to a subagent to be given to possible purchasers, it was within the scope of the subagent's employment to represent that this was the lowest price the owner would accept.
5. Where the price so fixed by the principal agent was higher than that asked by the owner, the fact that the subagent in good faith represented to purchasers that it was the lowest the owner would accept does not relieve the principal agent from the effect of such representations.
6. Where the subagent had reasonable grounds to understand that the price given him by the principal agent was the owner's price, and concealed no material fact within his knowledge from the purchasers, he incurred no liability by reason of his representation that this was the owner's lowest price.

APPEALS from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed on appeal of defendant Crosby; affirmed on appeal of defendant Hume.*

Both defendants in 1914, and for some time before, were engaged in the business of dealing in real estate in

Oneida county, defendant *Hume* having his office in the city of Milwaukee and defendant *Crosby* at Rhinelander in Oneida county.

The plaintiffs, husband and wife, were residents of the state of Missouri. *Mrs. Estes* in August, 1914, came to Rhinelander for the purpose of investigating a proposed purchase by them of a farm in Wisconsin. She called upon the defendant *Crosby,* knowing him to be in the real-estate business, and was shown by him certain pieces of property for the sale of which he had or claimed to have the agency, among which was a farm that had been placed for sale through him by defendant *Hume* at the fixed price of $4,000, with an agreement for $200 as a commission in case of a sale. The farm in question at that time was actually owned by one E. S. Shepard.

The transactions between *Hume* and Shepard were oral and in writing.

In July, 1913, Shepard wrote the defendant *Hume,* referring to the farm in question, and saying:

"The 197.95 acres on Lake Julia I told you you could have for $2,000 cash, no com. [understood to mean commission]. This land is actually worth $25 to $35 per acre, but owing to my need of raising money to pay this I have put the price down to almost nothing for the sake of raising immediate cash to pay with."

Three days later he again wrote to defendant *Hume,* referring to a talk with some man who had called on him with reference to the same farm: "I would not tell him the price I gave you. Don't tell any one anything for fear—see?"

Hume testifies that subsequent to these letters Shepard orally raised the price to $3,500, then down to $3,250, and finally accepted $3,000 cash.

August 17th plaintiffs wrote to *Crosby:*

"What is the best terms possible to get on the place? As I told you, we can now pay $1,000 down and more as soon as we sell, which we hope to do soon, but of course we cannot

tell. If we could pay the $1,000 down and let the balance run indefinitely at six per cent. or until we can sell (which we hope to do soon), we will then turn the money in on the place or hope to make some next year if enough can be broke to farm. . . . I want to decide on some place, so please answer this the same day you receive my letter. . . . Please write just what you think we could do on same. . . ."

Crosby to plaintiffs August 19th:

"The piece in question belongs to a gentleman in Milwaukee who wanted me to sell it and he told me to sell it for $4,000 on any reasonable terms. I think he would be satisfied with $1,000 cash down. . . ."

Letter of August 26th, *Crosby* to plaintiffs:

"Dear Sir: *Mr. Hume* of Milwaukee was in the office this morning and talked with me about that Shepard farm. I supposed all the time that he owned that, because he bought a tract of land from Shepard and he gave me a list of this farm for me to sell, but it seems that he does not own it and that Shepard still owns it, and has about decided not to sell, but he told *Mr. Hume* that he would sell it for $4,000 provided it is all cash, and the sale must be made this week or early next. *Mr. Hume* says that he is going back to Milwaukee Friday and if he can find anybody who will take a mortgage for $3,000 on the place, he will wire me and we will close the deal up at once, but I don't want to take your $1,000 and pay on the land until I know that he can get somebody to handle the $3,000. . . ."

In September plaintiffs purchased the farm by paying $1,000 cash and giving a note for $3,000 secured by mortgage. They moved there in October and have lived there since.

The deed from Shepard was made directly to the plaintiffs and was sent to them by *Crosby*, after he had received the $1,000 and the mortgage, in a letter of September 18th saying:

"Dear Madam: I just returned from the state fair, and the deed being all recorded, am inclosing it herewith. The deed was made from Shepard direct to you to save transfer

through *Mr. Hume,* and *Mr. Hume* had a trade with him on some other property, so made the deed run, 'Consideration $3,250 and other valuable considerations.' So you will understand why that sum is mentioned in the way that it is. . . ."

August 6, 1914, *Hume* had written *Crosby* saying:

"This was given to me as a 200-acre tract, and my price on it, as I telephoned you, was $4,000, and we would have to get this price even if the acreage should fall short."

September 1st, after *Hume* had been notified of the progress of the deal between *Crosby* and plaintiffs, he writes *Crosby* as follows:

". . . I was not able to see my party regarding the Lake Julia land until noon today, but am in shape to carry through the proposition providing I can get the property from Shepard as I talked to you. Shepard wants all cash and will consider nothing less. I am prepared to pay it to him, providing the deal that you have on hand goes through. If you will have your party deposit $1,000 in your bank at Rhinelander, payable to," etc.; "also have her execute a mortgage of $3,000 payable to," etc.; "on advice from you that the money has been deposited, I would immediately go up and close the deal with Shepard. In handling this matter on your part, I would not mention to anybody that you have anything to do with Shepard, for the reason that I stated to you."

On September 12th he again writes *Crosby:*

"I called up Shepard on the phone and I find that the matter is still open, so I secured money and will be up there on Monday morning to conclude deal, provided Shepard does not change his mind."

The following testimony was given by *Mr. Hume* on the trial:

"*Q.* Did you have anything in writing or anything that was binding between Mr. Shepard until that date when you went to his place of business or to his home with money in your pocket to buy? *A.* Nothing. The question came up, and I said, 'Now, Gene, you better give me a writing,'

and he said, 'No, we have dealt enough and my word will be all right. You get around here and we will clean it up.' "

Shepard testified that he was paid only $2,750 for the property; that *Hume* claimed to have a partner in the deal with whom he must share a $500 commission.

After plaintiffs learned that considerably less than $4,000 had been paid to the owner, Shepard, on the farm they brought this action against the two defendants to recover the difference between the amount so paid and the $4,000.

A special verdict was submitted to the jury, which with the answers thereto was as follows:

"(1) Did the statements orally and by letter which were made by defendant *Crosby* to the plaintiffs, naturally and reasonably convey to the plaintiffs the understanding that $4,000 was Shepard's lowest price for the land in question? *A.* Yes.

"(2) If you answer the first question 'Yes,' then did the plaintiffs pay $4,000 for the land in question by reason of such understanding? *A.* Yes.

"(3) If you answer the second question 'Yes,' then were the plaintiffs justified in relying upon the representations of the defendant *Crosby* in respect to Shepard's price? *A.* Yes.

"(4) Did the defendant *Hume* give the defendant *Crosby* reasonable grounds to understand, before the sale was made to the plaintiffs, that Shepard's price for the land was $4,000, out of which a commission was to be paid? *A.* Yes.

"(5) If you answer the first three questions 'Yes,' then what damages did the plaintiffs suffer by reason of the misrepresentations therein referred to? *A.* $875."

Upon the fourth question the court charged the jury as follows:

"You will note that it relates to Shepard's price and to a time before the sale was made to the plaintiffs. Did the defendant *Hume,* by his conversation and correspondence with *Crosby,* give *Crosby* reasonable ground to understand that Shepard's price was $4,000, out of which he would pay a commission?

"If the evidence satisfies the jury to a reasonable certainty that this question should be answered affirmatively, then you will so answer it. Otherwise you should answer it 'No.' "

After the verdict the two defendants made separate motions for judgment in their favor, or, in default thereof, for other relief, which were severally denied and plaintiffs' motion for judgment upon the verdict granted, and thereupon judgment entered for the amount of damages as found by the jury, together with interest and costs, and from the judgment so entered the two defendants have severally appealed.

The cause was submitted for the appellant *Crosby* on the brief of *Charles F. Smith, Jr.,* of Rhinelander; for the appellant *Hume* on that of *E. D. Minahan* of Rhinelander; and for the respondents on that of *J. & M. Van Hecke* of Merrill.

The following opinion was filed January 13, 1920:

ESCHWEILER, J. The appellant *Hume* assigns as error: (1) that there is no evidence to warrant the instruction to the jury given by the court to the effect that he, *Hume,* was the agent of the owner, Shepard; (2) or that *Crosby* was such agent; (3) that there is no cause of action shown as against him, *Hume;* (4) that the representation made by *Crosby* that the bottom price of this property was $4,000 was not within the scope of *Crosby's* employment; (5) that there is no ground for liability against the agent *Crosby* and therefore there can be none predicated against *Hume;* and lastly, (6) that there is no evidence to support the finding of the jury to the fourth question of the special verdict.

However much *Mr. Hume* may have felt justified, from his manner of dealing with Mr. Shepard and possibly from more or less of a custom among people engaged in that line of business, in proceeding to deal with this farm as though he were the owner and therefore fixing such price upon it

as he pleased and lawfully might, it nevertheless appears from the correspondence and testimony given above, there being no writing sufficient to meet the requirement of the statute, that there was at no time any binding agreement in law between them sufficient to give *Hume* an interest in the real estate. When the time came for the conclusion of the transaction with the plaintiffs *Hume* evidently did not consider that any prior negotiations between himself and Shepard were complete or binding before he offered to Shepard the cash to meet the latter's then terms. This was after the plaintiffs had paid their $1,000 to *Crosby* and he in turn sent that sum to *Hume*.

In offering this property for sale as he did, *Hume* could only act on his own behalf in case he had such a legal interest as would warrant such a course; if he did not possess such interest he was in law an agent of Shepard, the real owner. Not having placed himself in the first position, the legal consequences of his acts necessarily placed him in the second. The trial court was therefore correct in his charge to the jury in summarizing the situation by saying that *Hume* was the agent of Shepard. As between Shepard and *Crosby,* the latter was therefore a subagent of the former, conceding *Hume's* right to employ such a subagent.

The contention on the third point, to the effect that there is no cause of action against *Hume,* also cannot be sustained.

Although *Crosby* was subagent for Shepard he was also at the same time agent for the defendant *Hume* in this transaction with the plaintiffs. As such agent for *Hume* he represented to the plaintiffs that the lowest price for this property was $4,000. *Hume* fixed that price himself, and, knowing that it was being made by *Crosby* to the plaintiffs, received the benefit of such representation. Having profited thereby, he, as principal for his agent, *Crosby,* must be held chargeable with the damage done to the plaintiffs by their relying upon and acting on such representation. *First Nat. Bank v. Hackett,* 159 Wis. 113, 119, 149 N. W. 703.

There is support for the finding of the jury that the plaintiffs relied upon this representation that $4,000 was the lowest purchase price from the evidence of the plaintiffs as well as by the assumption, in which a jury may properly indulge, that in the usual course of human affairs purchasers do not pay the higher in preference to a possible lesser price.

On the fourth point the evidence warrants the conclusion that, in making the representation to the plaintiffs as to the price being the lowest, *Crosby* was acting within the scope of his employment. *Hume* fixed this price, gave it to *Crosby* to be given to possible purchasers, and it was therefore strictly within the scope of the employment to so represent it.

The question argued in the fifth proposition as to whether or not there was a liability against *Crosby* is immaterial so far as defendant *Hume* is concerned. His liability is predicated upon that which was done on his behalf by *Crosby*, who acted only as agent for him and from whose acts as subagent *Hume* reaped the benefit. *Hume* alone was the moving cause for this error of fact which resulted in damage to plaintiffs, therefore he alone must assume the consequent liability.

The finding of the jury embodied in their answer to the fourth question of the special verdict, that *Crosby* had reasonable grounds to believe that the bottom price for this property was $4,000, is supported by the correspondence between the two defendants and the testimony. *Crosby* dealt with *Hume* alone, and not with Shepard. It was *Hume* who fixed the price, and he confirmed what *Crosby* had done in regard to the same by accepting the result.

On the appeal of defendant *Crosby* we deem it necessary to discuss but one of the several points urged by him.

Being satisfied, as we have above indicated, that the jury were warranted in arriving at the conclusion that *Crosby* had reasonable grounds, based upon his transactions with

the defendant *Hume,* to understand that the price of this property was $4,000 to Mr. Shepard less a commission, this in effect determined that *Crosby* acted in good faith in this transaction, and necessarily, also, that he used reasonable diligence in ascertaining as to the fact before representing the same. Being acquitted, therefore, by this finding of any lack of either good faith or reasonable care, there is no basis upon which he can be held personally liable. He concealed no material fact within his knowledge; he discloses in the letter of August 26th, *supra,* that he is merely conveying from *Hume* to plaintiffs the statement as to Shepard's selling price being $4,000, and he did not fail in the exercise of the ordinary care required of an agent in such a situation. He therefore breached no duty that he owed, if any, to the plaintiffs and incurred no liability. While a principal may be liable for the mistake of the agent, it does not follow that an agent, having acted in good faith and with reasonable care, is liable for the mistake of his principal.

It follows that the trial court was right in awarding judgment against the defendant *Hume,* but erred in denying the motion of the defendant *Crosby* for judgment in his favor.

By the Court.—The judgment is so modified as to discharge the defendant *Crosby* from any liability thereunder, and it is allowed to stand as against the defendant *Hume.* Appellant *Crosby* to have his costs on this appeal as against the plaintiffs, the plaintiffs to have theirs as against the defendant *Hume.*

The appellant *Hume* moved for a rehearing.

In support of the motion there was a brief by *E. D. Minahan* of Rhinelander, attorney for the appellant *Hume.*

In opposition thereto there was a brief by *Charles F. Smith, Jr.,* of Rhinelander, attorney for the appellant *Crosby,* and a brief by *J. & M. Van Hecke* of Merrill, attorneys for the respondents.

The motion was denied, with $25 costs, on March 9, 1920.

On April 5, 1920, a motion was filed by the appellant *Crosby* for an order amending the mandate. The following opinion was filed May 5, 1920:

PER CURIAM. The decision and mandate of this court on the appeal in this case determined that the defendant *Crosby* was entitled to a judgment in the court below of dismissal of the action as against him. Upon such a judgment in the circuit court he would be entitled to costs in his favor as against the plaintiff as a matter of course. For this reason we do not deem it necessary to change the mandate, and the motion to amend it is therefore denied without costs.

WHITEWATER TILE & PRESSED BRICK MANUFACTURING COMPANY, Appellant, vs. JOHNSON, Respondent.

December 2, 1919—March 9, 1920.

Corporations: Sale of stock at less than par value: Fraudulent issue: Intent: Accounting by promoter: Equity: Measure of damages.

1. An action by a corporation against one who was its promoter, secretary, and treasurer, for an accounting and to recover the value of stock fraudulently issued without consideration, is one in which fraud in a fiduciary relation is alleged, and equity will take jurisdiction.
2. The issue of stock at less than par value, or with an understanding that it is not to be paid for, is contrary to sec. 1753, Stats., and, when such facts appear, the issue is fraudulent in law irrespective of the intent.
3. The measure of damages in an action against a promoter of the plaintiff corporation for the issuance of stock to himself at less than par value is the difference between what he paid for the stock and the par value thereof, plus interest thereon from the date when the stock was issued to him.

APPEAL from a judgment of the county court of Walworth county: JAY F. LYON, Judge. *Reversed.*

Suit in equity for an accounting between plaintiff and defendant, who was a promoter and secretary and treasurer of the plaintiff corporation, and for the recovery of the value of stock claimed to have been fraudulently issued to defendant without consideration.

The trial judge filed an opinion but no specific findings of fact as required by statute. In the opinion certain facts are found to exist, among others that the defendant herein subscribed and paid for $4,000 in stock; that stock to the par value of $6,400 was issued to him; that one Gillen, the vice-president and manager of the corporation, and a stockholder, had property in the nature of machinery which he considered worth $8,000, but which he put into the corporation at a value of $4,000; that stock to the par value of $6,400 was issued to him for the property put in. *Johnson* paid $4,000 and no more for the stock issued to him. It likewise appears that Kestol and Baker subscribed and paid $1,000 each, but that stock of the par value of $1,600 each was issued to them. A Miss Hurlbut subscribed and paid for $500, but stock to the par value of $800 was issued to her. In each case stock of the par value of sixty per cent. in excess of that subscribed and paid for was issued to each stockholder on or about May 26, 1903, in all $6,300 in excess of what was paid. The trial judge found there was no fraud in the transaction, presumably because he thought the Gillen property may have been worth more than $4,000, at which it was put in, and because the corporation was not a going concern, had no business, and its stock, in his opinion, would not have sold at par, though at least some of the stockholders sold their stock at par or better. Judgment went for the defendant, and plaintiff appealed.

For the appellant there were briefs by *F. Henry Kiser* of Whitewater and *Page & Ferris* of Elkhorn, attorneys, and

Kopp & Brunckhorst of Platteville, of counsel, and oral argument by *L. A. Brunckhorst.*

E. T. Cass of Whitewater, for the respondent.

The following opinion was filed January 13, 1920:

VINJE, J. The claim that plaintiff cannot maintain an action in equity for an accounting is not well taken. Where fraud in a fiduciary relation is alleged, as it is here, equity will take jurisdiction. 1 Ruling Case Law, 224; 1 Corp. Jur. p. 623, § 70, par. 9.

The issue of stock at less than its par value, or with an understanding that part of it is not to be paid for, is contrary to the provisions of sec. 1753, Stats. 1898, and when such facts appear then the issue is fraudulent in law irrespective of the intent. The trial court therefore erred in drawing the conclusion from the facts found that there was no fraud, so far as each individual issue was concerned. Its finding, however, must be taken as negativing any conspiracy being entered into between the stockholders receiving an over-issue for the purpose of defrauding the corporation. We cannot say that such finding has no support in the evidence. That being so, only an individual and not a joint liability results.

Under the facts found and under the rule laid down in *Whitewater T & P. B. M. Co. v. Baker,* 142 Wis. 420, 125 N. W. 984, the court should have entered judgment against the defendant for the difference between the par value of the stock issued to him and the amount he paid therefor, to wit, the sum of $2,400, together with interest thereon at six per cent. per annum from May 26, 1903, when the stock was issued to him, and costs.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment as indicated in the opinion.

The respondents moved for a rehearing.

In support of the motion there was a brief by *E. T. Cass*

of Whitewater and *F. K. Shuttleworth* of Madison, attorneys for the respondents.

In opposition thereto there was a brief by *F. Henry Kiser* of Whitewater and *Page & Ferris* of Elkhorn, attorneys, and *Kopp & Brunckhorst* of Platteville, of counsel.

The motion was denied, with $25 costs, on March 9, 1920.

WHITEWATER TILE & PRESSED BRICK MANUFACTURING COMPANY, Appellant, vs. KESTOL, Executrix, Respondent.

December 2, 1919—March 9, 1920.

Whitewater T. & P. B. M. Co. v. Johnson, ante, p. 82, followed.

APPEAL from a judgment of the county court of Walworth county: JAY F. LYON, Judge. *Reversed.*

For the appellant there were briefs by *F. Henry Kiser* of Whitewater and *Page & Ferris* of Elkhorn, attorneys, and *Kopp & Brunckhorst* of Platteville, of counsel, and oral argument by *L. A. Brunckhorst.*

E. T. Cass of Whitewater, for the respondent.

The following opinion was filed January 13, 1920:

VINJE, J. This case is ruled by the case of *Whitewater Tile & Pressed Brick M. Co. v. Johnson, ante,* p. 82, 175 N. W. 786.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff for the sum of $600 with interest thereon at six per cent. per annum from May 26, 1903, and costs.

A motion for a rehearing was denied, with $25 costs, on March 9, 1920.

WHITEWATER TILE & PRESSED BRICK MANUFACTURING COMPANY, Appellant, vs. BAKER, Administratrix, Respondent.

December 2, 1919—March 9, 1920.

Whitewater T. & P. B. M. Co. v. Johnson, ante, p. 82, followed.

APPEAL from a judgment of the county court of Walworth county: JAY F. LYON, Judge. *Reversed.*

For the appellant there was a brief by *F. Henry Kiser* of Whitewater and *Page & Ferris* of Elkhorn, attorneys, and *Kopp &*

Brunckhorst of Platteville, of counsel, and oral argument by *L. A. Brunckhorst.*

E. T. Cass of Whitewater, for the respondent.

The following opinion was filed January 13, 1920:

VINJE, J. This case is ruled by the case of *Whitewater Tile & Pressed Brick M. Co. v. Johnson, ante,* p. 82, 175 N. W. 786.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff for the sum of $600 with interest thereon at six per cent. per annum from May 26, 1903, and costs.

A motion for a rehearing was denied, with $25 costs, on March 9, 1920.

ROWELL, Respondent, vs. RHADANS and another, Appellants.

December 3, 1919—March 9, 1920.

Vendor and purchaser: Co-grantors: Breach of joint covenant: Parties to action for purchase price: Mistake in description of deed: Pleading: General denial: Parol evidence to vary deed: Fraud: Appeal: Real issue not litigated: Disposition of case.

1. In the absence of allegations of fraud or mistake, oral evidence is inadmissible to contradict the provisions of a deed stating the description and amount of land conveyed.
2. Where a defendant's answer and counterclaim in an action on a purchase-price note alleged that the deed from plaintiff and his co-grantor embraced land to which they had no title, the co-grantor was a necessary party where the covenants in the deed were joint and not joint and several.
3. Where in such case the defendant purchaser alleged that plaintiff had no title to part of the land deeded, and plaintiff's reply was merely a general denial, defendant was entitled to recover the value of the land as to which title had failed upon the execution of the deed being admitted, the question whether the description in the deed was inserted by mutual mistake, not being presented by the pleadings.
4. An erroneous judgment for the plaintiff, entered without fully trying the real controversy between the parties, will be reversed and the cause remanded for a new trial under sec. 2405*m*, Stats.

APPEAL from a judgment of the county court of Walworth county: JAY F. LYON, Judge. *Reversed.*

On the 25th day of August, 1914, the defendants entered into a contract with the plaintiff and one John H. Overbaugh by which the defendants purchased from the plaintiff and Overbaugh a certain farm situated in Walworth county. The purchase price was $11,000. The defendants executed two promissory notes for $1,000 each, gave a mortgage for $5,000 upon the premises purchased, and gave in exchange certain property at Hartland, of the value of $4,000. The defendants were put into possession of the farm, paid one of the notes, and refused to pay the second note, due January 1, 1915. Overbaugh indorsed the note to the plaintiff, and this action was begun to enforce payment of the note for $1,000 due January 1, 1915.

The defendants answered admitting the execution and delivery of the note set out in plaintiff's complaint, being the note due January 1, 1915, admitted that no part thereof had been paid, set out the purchase of the farm from the plaintiff and Overbaugh, and that the transaction included a certain amount of personal property, as to which there is no dispute; and further alleged that the farm was conveyed to the defendants by warranty deed of plaintiff and Overbaugh, which deed contained the usual covenants as to seisin, incumbrances, and for peaceable possession, and warranty of title. It further set out that of the premises described in the conveyance to them about six acres belonged to one Harry Mereness and Grove Mereness, who were in the exclusive possession thereof; that the grantors never placed the defendants in possession of said six acres; alleged that the six-acre tract was an inducement for the purchase by the defendants of the farm in question from the plaintiff and Overbaugh; that the plaintiff and Overbaugh represented to the defendants that said six-acre tract was a part of the premises sold by the plaintiff and Overbaugh to the defendants; that the plaintiff and Overbaugh in fact had

no title whatever to the six-acre tract, and that by reason of the breach of the covenants of the warranty deed the defendants had suffered damages in the sum of $1,800.

The facts alleged in the answer were set out both as defensive matter and by way of counterclaim.

For a reply to the counterclaim the plaintiff made a general denial. The case was tried before the court without a jury. The court found that the defendants executed and delivered the note described in the plaintiff's complaint; that the same was indorsed by Overbaugh to the plaintiff; that the note was due and payable January 1, 1915; that no part thereof has been paid;

"That said note was delivered by defendants to plaintiff in part payment of a certain piece of land described in the answer and counterclaim of defendants; that the deed given by the plaintiff and the above named John H. Overbaugh, and which is recorded in the office of the register of deeds of Walworth county on August 29, 1914, in volume 137 of deeds, on page 556, alleged in the answer and counterclaim of defendants, erroneously included a seven-acre tract of land which did not belong to the plaintiff or the said John H. Overbaugh."

"6. That the plaintiff or the said John H. Overbaugh, grantors of the deed above referred to, did not represent to the defendants or either of them that he or either of them had title to the said seven-acre tract; that the defendants did not rely on any representations in regard to said seven-acre tract as alleged in defendants' answer and counterclaim.

"7. That defendants found the seven-acre tract of land erroneously included in the deed referred to, in the possession of a third party, exercising all the acts of ownership over said tract, and made no complaint whatsoever to plaintiff until plaintiff demanded payment of the note above referred to."

The court concluded, as a matter of law, that the plaintiff was entitled to judgment in the sum of $1,000 and interest and costs. Judgment was entered accordingly, and from the judgment the defendants appeal.

For the appellants there was a brief by *Wallace Ingalls* of Racine and *Clarence Haugen* of Beloit, and oral argument by *Mr. Ingalls.*

Shannon & Cronin of Oconomowoc, for the respondent.

The following opinion was filed January 13, 1920:

ROSENBERRY, J. The record in this case is ragged and unsatisfactory. The outstanding features of this transaction are plain; the principles applicable are elementary. The pleadings should have presented the real issue. It is as plain as a pike-staff that the deed given by the plaintiff and Overbaugh to the defendants is binding and conclusive upon both parties thereto, and that oral evidence cannot be given to contradict it, in the absence of any allegation of fraud or mistake. It is equally clear that Overbaugh was a necessary party, as the covenants contained in the deed were joint, and not joint and several.

The plaintiff in his reply set up no grounds for reformation of the deed, entered a general denial, under which the sole issue was *non est factum.* Upon the deed being offered and received in evidence, its execution being admitted, the defendants were entitled to recover upon their counterclaim, under the pleadings as they stood.

The real question in the case, as to whether the description inserted in the deed was inserted by mutual mistake of the parties, was neither presented by the pleadings nor tried by the court. In *Semple v. Whorton,* 68 Wis. 626, 32 N. W. 690, it was intimated that if a party sought to be relieved from a covenant such as the one contained in the deed in this case, the only remedy would be in equity for reformation. In *Casgrain v. Milwaukee Co.* 81 Wis. 113, 51 N. W. 88, it was said:

"The reformation of contracts is purely cognizable in equity. It must be done by equitable action or by equitable counterclaim. It cannot be by mere defense in an action at law. In the present case there has been no action brought

nor counterclaim interposed to reform this contract; consequently it must stand as written."

So here, the plaintiff could not contradict the deed by parol evidence, or show that the deed was intended to convey premises other than those described, in the absence of an allegation of fraud or mistake, and if, as the plaintiff claimed upon the trial, the plaintiff and Overbaugh intended to sell and the defendants intended to buy the premises lying east of the Palmer line, and the description inserted in the deed was supposed by both parties to describe such premises, but by reason of mistake it did not, then the deed should be reformed, and the pleading should be so framed as to present that issue.

We have no hesitancy in reversing this judgment under the provisions of sec. 2405*m*, Stats., and remanding the cause for a new trial, for the reason that the real controversy has not been fully tried. Proper amendments to the pleadings should be made to bring in Overbaugh as a party, and to present the question of whether or not there was a mutual mistake of the parties in the execution and delivery of the deed to the premises in question.

By the Court.—Judgment reversed, and case remanded for new trial.

The respondent moved for a rehearing.

In support of the motion there was a brief by *Shannon & Cronin* of Oconomowoc, attorneys for the respondent, and *Richmond, Jackman, Wilkie & Tocbaas* of Madison, of counsel.

In opposition thereto there was a brief by *Wallace Ingalls* of Racine, attorney for the appellants.

The motion was denied, with $25 costs, on March 9, 1920.

SHERWOOD, Appellant, vs. REDFIELD and another, Respondents.

December 5, 1919—March 9, 1920.

Workmen's compensation: Notice of appeal to supreme court: Notice of entry of order of confirmation of award: Parties.

Where in an action in the circuit court to set aside an award of the industrial commission the claimant did not appear, but the attorney general appeared for the commission and secured affirmance of the award and served notice of entry of judgment on the employer, the employer, to perfect his appeal, under secs. 2394—21, 3042, Stats., limiting the time to thirty days from date of service by "either party on the other" of the notice of entry, must serve notice within thirty days on both the attorney general and claimant, the judgment being indivisible and notice of entry by the attorney general operating for both parties.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Dismissed.*

This is a motion to dismiss an appeal. The respondent *Redfield* obtained an award before the *Industrial Commission* against his employer, *Sherwood,* for the loss of an eye occurring during his employment, and *Sherwood* brought this action to reverse the award in the circuit court for Dane county. The *Industrial Commission* appeared by the attorney general, the claimant not appearing, and the case was tried and the award affirmed. Thereupon judgment of affirmance was entered and notice of entry thereof was served by the attorney general on the appellant, but the claimant served no notice of entry of judgment. Within the time allowed by the statute for taking an appeal from such a judgment (namely, thirty days from the service of notice of the entry thereof—secs. 2394—21, 3042, Stats.), the appellant served notice of appeal on the attorney general, but served no notice of appeal on *Redfield* until several months later and after the making of the present motion. The attorney general moves to dismiss the appeal because of failure to serve a notice of appeal on *Redfield* within

thirty days after service of the notice of entry of judgment by the attorney general.

Winfield W. Gilman, assistant attorney general, for the motion.

T. C. Richmond of Madison, *contra.*

The following opinion was filed January 13, 1920:

WINSLOW, C. J. This case is in all respects similar to the case of *Frontier M. Co. v. Industrial Comm.* 168 Wis. 157, 169 N. W. 312, except that in the last named case no service of the notice of appeal was at any time made on the claimant, while in the present case such service was made after the expiration of the thirty-day period and after the motion to dismiss had been made. It was assumed by counsel and court in the *Frontier Case* that the notice of entry of judgment served by the attorney general on behalf of the *Commission* set the thirty-day period in which appeal might be taken in full operation, so that if it was necessary to serve the notice on the claimant personally it must be done within the period. The contention made there was that the attorney general, though appearing for the *Commission,* in fact represented the claimant as well, and hence that service of notice of appeal on him was in effect service upon the claimant.

In the present case the contention is that the notice of entry of judgment served by the attorney general can only serve to set the thirty-day period running in favor of the *Commission,* and that, no notice having been served by the claimant, the thirty-day period has never commenced to run in his favor, and hence that both appeals are properly here.

We have given the subject very careful consideration and feel convinced that this contention cannot and ought not to prevail in a case like the present. This is a case where the judgment is a single indivisible proposition in favor of two parties. No part of it could be reversed as to one party and affirmed as to the other; it must be affirmed as to both parties or reversed as to both parties. It is not a case where

there is a judgment with a number of provisions, some affecting one party and some another, some of which could be reversed while others could be affirmed. In such case it may well be that notice of entry of judgment should be given by each party having a separate interest to protect (although we do not decide the point now), but no such considerations are present here. There is here but a single judgment, and a single proposition in dispute. On one side of that proposition stands the appellant insisting on reversal, on the other side stand the *Commission* and the claimant insisting on affirmance. The statute (sec. 3042) limits the time to thirty days from the date of the service "by either party upon the other" of the notice of entry. We hold that in the case of a single indivisible judgment like the present in favor of two litigants, a notice served by one of them upon the adverse party is to all intents and purposes a notice served by one party upon the other, and sets the thirty-day period running in favor of both. Any other construction would lead to absurd results. Take the present case, for instance. Suppose the appellant had allowed the thirty-day period to pass by and served no notice of appeal on the *Commission,* but afterward concluded to serve notice of appeal on the claimant. Under the contention of the appellant he could do so and prosecute his appeal to a judgment of reversal, and the situation would then be that there would be no award so far as the claimant is concerned, but there would be a robust and full-grown award so far as the *Commission* is concerned, which never could be affected because the time for appealing had expired.

We have found little authority which throws any light on the subject and have preferred to decide the question upon the evident intent of the statute.

By the Court.—Appeal dismissed without costs.

A motion for a rehearing was denied, without costs, on March 9, 1920.

WILL OF KEENAN: HAYDEN, Appellant, vs. NUZUM and others, Respondents.

January 13—March 9, 1920.

Wills: Testamentary capacity: Evidence: Charities: Trust providing free medical dispensary: Certainty as to beneficiaries: Trial: Advisory verdict: Withdrawing issue from jury: New trial: Testimony which would not change result: Appeal: Harmless error: Excluding cumulative evidence: Error in instructions on advisory verdict.

1. In a proceeding for the probate of the will of an aged widow, the evidence is *held* to sustain the conclusion of the court that testatrix was of sound and disposing mind when she executed the will and the codicils attached thereto.
2. The verdict of the jury in this case being advisory only, the court was not bound by it, and could change the answers of the jury to special questions when it found they were not supported by the preponderance of the evidence, and was not required to submit the issues of fact to another jury.
3. Since the questions litigated were ultimately decided by the court contrary to the verdict of the jury, alleged errors in instructions need not be considered.
4. Where there was much testimony of the same nature by persons having had personal transactions with testatrix, the exclusion of the testimony of a witness as to the loss of mind of testatrix and her inability to understand and comprehend ordinary details concerning business and property was not prejudicial.
5. There being no evidence to sustain the claim that the will was the result of undue influence, the court properly withdrew the inquiry on this issue from the jury.
6. Excluded testimony and newly discovered testimony bearing on the testamentary capacity of testatrix are *held* not such as to call for a different finding on the subject.
7. The residuary clause of the will giving the residue to trustees who were to establish and carry on one or more free medical dispensaries, etc., is not subject to the objection that it was uncertain as to beneficiaries, contradictory in terms, and conferred on the trustees powers in conflict with the law, so as to remove them from the supervision and control of the courts.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is an appeal by *Mortimer M. Hayden,* contestant of the proposed will of Antoinette A. Keenan, from a judgment affirming a judgment of the county court of Milwaukee county admitting to probate the alleged will, with two codicils, of the above-named testatrix.

On July 25, 1915, a petition for the probate of this will and codicils was presented to the county court by *R. Franklin Nuzum,* who is named as executor by the first codicil. *Mortimer M. Hayden* filed objection to the probate of the alleged will upon the following grounds:

(1) That Mrs. Keenan had not testamentary capacity to make the will and codicils when they were executed; (2) that the execution of the will and codicils was procured by undue influence exerted by *Nathan Pereles, Jr.* On the trial the contestant also objected to the probate of the will upon the grounds that the provisions attempting to create a trust are void and hence the whole will is invalid.

The will was probated in the county court without a trial of the issues raised by the objections to its probate.

Mrs. Keenan is the widow of Mathew Keenan, who had resided in Milwaukee for many years and died there in 1898. He died intestate and left no children. Mrs. Keenan as his sole heir inherited his estate, which was valued at $276,513.24. When Mrs. Keenan died the estate had increased in value to over $403,000. Mrs. Keenan was about ninety years of age when she died. Her heirs at law consisted of a brother, who died before the trial in the circuit court, nephews, nieces, grandnephews and grandnieces, most of whom lived at long distances from Milwaukee. She manifested a high regard and respect for her husband, and after his death managed the estate she inherited from him through agents and controlled its investment and use up to the time of her death. During her widowhood she manifested a desire and expressed an intent to devote the estate she and her husband had accumulated to perpetuate his memory in the form of a charitable bequest. From the

time of her husband's death in 1898 to 1907 she gave her business affairs close personal attention. In 1907 she suffered a severe illness which impaired her physical capacity to an extent that she was then dependent on others to assist her in her business matters and thereafter required the attendance and service of others to provide her with bodily comforts. She continued to participate in the control of her estate and in the investment and expenditure of her moneys. She maintained her membership in church and club organizations and contributed to religious and charitable organizations in which she was interested. In her personal characteristics she was domineering and critical of those about her or in her service; she was acquisitive in money matters to an extent that made her penurious and avaricious, except on occasions when she gave to public benevolences in which she had a personal interest. In her intercourse with persons about her during the latter part of her life she was irritable, cross, and subject to fits of violent anger without seeming grounds for provocation. But she maintained her business and household relations with practically the same persons during her widowhood and persisted in retaining them as trusted agents, counselors, and friends. After 1907 she was unable to leave her bed or walk about the house without assistance, and was at times confined to her bed for periods of days and was physically weaker than she had been before; her mental powers had grown weaker as a result of her loss of physical strength and health. She came of a family who lived to an extreme old age, but who in their later years suffered from mental breakdown and insanity. Some years before she made this will she showed that she was subject to illusions which manifested themselves in such ways as seeing decorations on a neighbor's house when there were none, hearing birds sing in winter when there were no birds about, and by steadily refusing to eat fruit given her by her brother because it might be poisonous. On some occasions she

manifested a suspicion concerning the honesty of her trusted female attendant. These acts and conduct did not persist for any length of time nor show a constant condition of mind, and when they passed her normal mental processes resumed control and enabled her to continue in control of her property up to the time of her death.

Mrs. Keenan made several wills before the one involved here. Some of them were executed prior to 1911; the contents of these is not known. In 1911 she executed one drawn by T. J. Pereles at her direction, in which she made similar bequests to relatives and to religious and charitable institutions as in this will, and gave the residue, which constituted the greater part of her estate, to the Wisconsin College of Physicians and Surgeons of Milwaukee, Wisconsin, to be used by it in carrying on the work of its free dispensaries in Milwaukee. It appears that Mrs. Keenan was informed by Miss Yorgey, who attended to her domestic and personal affairs under her direction, that this College of Physicians and Surgeons had gone out of existence and had transferred its property to Marquette University. At Miss Yorgey's earnest solicitation Mrs. Keenan requested an interview with *Nathan Pereles, Jr.*, who called at her home in the early part of 1913, bringing with him the will of 1911. This was his first business interview with the deceased. He had known her for many years when his father acted as her legal adviser. At this interview the will of 1911 was read to her in detail; she indicated what changes were to be made in some of the personal bequests, and directed that the residue be given as a fund for the care of the sick, and asked him to draw up a will embodying her suggestions. *Mr. Pereles* made a draft of the residuary clause, which gave the residue of her estate for the relief of persons afflicted with tuberculosis, and sent it to her house with a letter under date of February 13, 1913, addressed to her as follows:

"Dear Mrs. Keenan: Inclosed you will find draft of the

proposed clause in the will concerning the dispensary. As soon as you wish to see me about it, please telephone. I have left the name of the trustee blank, as I did not know whom you wished to name."

Within a few days *Mr. Pereles,* upon request of Mrs. Keenan, called on her at her home, and was told by Mrs. Keenan that the draft was not satisfactory because she wanted the fund to be used for the benefit of persons who were suffering from any illness and that she wanted *Mr. Dahlman, Mr. Nuzum,* and himself named as trustees. A copy of the draft of the residuary clause was then made by *Mr. Pereles,* submitted to her by him, and she approved it and directed him to prepare the will with these changes which she demanded to create the trust for the purposes of this charity. This he did, and on March 6, 1913, he went to her house, when the whole will was read to her paragraph by paragraph, except one, which she read. She approved the will and it was executed by her. She was then given a sealed copy and the original was taken by *Mr. Pereles* for safekeeping. The two codicils to the will were prepared at Mrs. Keenan's direction and embody the changes she wanted made in the provisions of the will. The circumstances that led her to make these changes in her will are fully detailed in the testimony and show satisfactorily that the codicils embody her own ideas and that they express her personal wishes of what she wanted done to modify the will. It is apparent that the last codicil includes the changes which were considered by her and Mr. McVety, with whom she was consulting in the month of May, 1915. About June 1, 1915, after she had had consultation with Mr. McVety concerning the steps that had been suggested to place her under guardianship and the provision contained in her will and codicil, she again summoned *Mr. Pereles* to her house by telephone and told him she desired some changes to be made in the will regarding the investments by the trustees, and that she contemplated providing

otherwise for Miss Yorgey and leaving out the bequest to her. *Mr. Pereles* suggested that she could provide that any person who attempted to contest her will to declare it void should forfeit any legacy given him in the will or codicils, which she approved and directed embodied with the changes she specified in a codicil. This was done by *Mr. Pereles* and presented to her June 7, 1915. The second codicil was then executed in his presence and that of Strous and Sullivan; the will and the codicil were attached and were taken by *Mr. Pereles.* Mrs. Keenan was given copies. At the interviews with Mr. McVety the will and first codicil were produced, talked about, and Mr. McVety told her she had given too much power to the trustees, and their power as to investments ought to be limited. This she did in the last codicil. Mr. McVety prepared a will after his interview with her which contained the provisions of the existing will, naming *Mr. Nuzum* executor and himself in the place of *Mr. Pereles,* and limiting the trustees' power of investment. This writing Mr. McVety brought to Mrs. Keenan's house on July 10th for the purpose of approval and execution. It was read by him to her, but before witnesses were procured she died.

In circuit court the case was tried to a jury and the court submitted to them three questions, namely: Was the deceased of sound and disposing mind and memory when she executed the will on March 6, 1913; when she executed the first codicil March 6, 1914; and when she executed the last codicil June 7, 1915? To each of these questions the jury answered "No." After hearing argument by counsel for the respective parties the trial judge changed these answers of the jury from "No" to "Yes," and on December 5, 1917, filed formal findings to the effect, as he had determined subsequent to the argument of changing the answers of the jury in the special verdict, that the proposed will and codicils were the last will and testament of Antoinette Keenan, deceased; that these instruments were properly executed; that

the same were not procured to be made by any undue influence, and that she was of sound mind and memory and had mental capacity to make them as her last will and testament. The trial court declined to pass on the question raised as to the invalidity of the trust created by paragraph 21 of the will.

The will and codicils as printed in the case cover fourteen pages and need not be reprinted here. After making a number of personal bequests and some gifts to charity, she gives the residue of her estate to trustees to hold in trust for the purposes: To convert the same into personal property, invest and reinvest it "only in first mortgages on improved real estate, municipal, county, or government bonds, or such other conservative investments as shall be permitted by law to trustees for investments, and such reinvestments of the securities coming to them shall be in conformity with the statutes and rules of court in such case made and provided." (Second codicil.)

The trust property is to be held by the trustees and be "known as the Mathew Keenan Endowment Fund," and is to establish and carry on one or more free medical dispensaries in the city of Milwaukee for the benefit of "such indigent sick persons residing in the city of Milwaukee as my said trustees in their wise discretion shall deem worthy of such aid and assistance," without regard to their race, color, or religion, and empowers them to exercise uncontrolled discretion to use the income of the trust fund for free medical dispensaries in Milwaukee or other agencies providing the same relief, upon condition that such extension of relief granted by the trustees shall not operate to create a right to the income of the trust except as the trustees determine. Other provisions of the trust prescribe various details concerning the execution and administration of the trust, not necessary to repeat here.

Judgment was awarded affirming the judgment of the county court admitting the will to probate and directing that

the cause be remanded to the county court for further proceedings according to law.

For the appellant there was a brief by *Paul D. Durant,* attorney, and *Frank M. Hoyt,* of counsel, both of Milwaukee; a separate brief by *Mr. Durant;* and also briefs by *O. T. Williams* of Milwaukee, of counsel; and the cause was argued orally by *Mr. Hoyt* and *Mr. Durant.*

For the respondents there was a brief by *Charles Weaver* of Milwaukee, attorney for *R. Franklin Nuzum,* and by *George Lines* and *Louis A. Dahlman,* both of Milwaukee, attorneys for *Nathan Pereles, Jr.,* and *John F. Dahlman,* trustees; and the cause was argued orally by *Mr. Lines* and *Mr. Dahlman.*

SIEBECKER, J. It is contended that the court erred in finding that no undue influence was exercised upon the testatrix to procure her to make and execute this will and codicils. The record fails to show that any improper attempts were made to persuade or induce Mrs. Keenan to make these testamentary dispositions of her estate or that any undue influence was exercised that misled or improperly influenced her to do so. Upon this issue in the case the trial court's conclusions are clearly right and cannot be disturbed.

The important controversy of fact litigated in the case is: Was Mrs. Keenan of sound and disposing mind when she executed the instruments propounded as her last will and the codicils attached thereto? The foregoing statement recites the leading incidents and facts of her life which bear on this inquiry from the time of her husband's death in 1898 to the time of her death. The evidence discloses that she had characteristics that led her, without apparent justification, into unreasonable, arbitrary, and harsh conduct in dealing with her relatives and those persons who served her most faithfully in promoting her best interests and comforts in sickness and distress. These attributes of her

nature seem to have sprung from her penuriousness, avarice, perversity, and violence of temper. It is manifest that these personal traits were intensified and less within her control, by reason of impaired health and strength, from and after 1907, and that her physical and mental feebleness seriously affected her from this time to the time of her death. The testimony also shows that she developed vagaries and illusions, and that reason and expostulation concerning them failed to impress her of their unreality or that they were the birth of her imagination. Besides these characteristics of temperament and abnormal mental manifestation, it is urged that her acts and conduct show that physical and mental disease had so affected and impaired her memory, will, and understanding as to render her incapable of comprehending and understanding her business affairs or her relationship to those who were the natural objects of her bounty. It is common knowledge that persons may be so swayed by avarice, superstition, and perverse sentiments and feelings as to lead them into extreme and unreasonable acts though they be of sound mind and capable of fully understanding their affairs. Likewise, individuals of sane and comprehending mind may persist in notions and illusions, in spite of argument and explanation which commonly appeal to and suffice to persuade the generality of persons of their unreality. The evidence shows that Mrs. Keenan at no time after her serious illness in 1907 refrained from, nor was she prevented from, participating in the management of her domestic or business affairs. The evidence is clear that nothing was done without her direction, nor were her personal and business transactions finally consummated without her personal assent. True, she conducted her affairs through agents and employees, but it is significant that none of them undertook to do anything for her without submitting it to her for her approval. It is urged that this was done to satisfy her notions and childish disposition induced by her decrepitude,

but the fact appears to be that she comprehended the meaning and consequence of the transactions submitted to her. Her manner and method in participating in her affairs on these occasions show a persistent and constant determination to control whatever was before her, and her conclusions and directions were accepted and carried out. It also appears that she had such a grasp of these transactions that she intelligently and understandingly conferred with others respecting them, indicating that she had sufficient mental grasp to comprehend them and pass judgment on the subjects before her. Her physical frailty for many years seems to have rendered her unable to keep up a long or protracted interview about her business and to have prevented her from sustaining a mental strain for a long period at a time. It is shown, however, that whenever her physical strength enabled her to undertake to do business regarding her property, she displayed a mental condition which enabled her to comprehend and understand its bearing and relation and to determine what was to be done under the circumstances. It is also significant that she persistently adhered to the one plan of disposing of the bulk of her property in the form of a public charity and that she did not make many changes in the minor bequests on the several occasions when she had the testamentary disposition of her property under consideration. It is abundantly established that she acted providently in the management of her property and persistently insisted upon preserving it for a memorial for her deceased husband. Her acts and conduct and the manner of dealing with the persons whom she engaged to perform services for her in various capacities, from domestic service to professional employment, negative the claim that she was a mental incompetent and unable to manage her affairs. The reliance these persons placed on her capabilities to do what she did impairs the weight of their opinion that she was mentally incompetent to make the will and codicils in question.

Further specification of the details of the evidence bearing on Mrs. Keenan's mental soundness and capacity at the times she disposed of her property under this will would not be helpful. A study of the record has persuaded us that the findings of the trial court are abundantly supported by the testimony and that they cannot be disturbed. The verdict of the jury being advisory, the court was not bound by it and was at liberty to change the answers of the jury to special questions when it found they were not supported by the preponderance of the evidence.

The court properly made its findings of facts on the issue covered by the special verdict and was not required to submit the issues of fact to a second jury. The direction of another trial before a jury was a matter of discretion for the trial court. If the trial court was dissatisfied with the verdict as being against the weight of the evidence, it was incumbent on the court to make its findings on the issues tried in conformity with the preponderant weight of the evidence. This the court did, and we find the trial court is sustained by the record. *Will of Meurer,* 44 Wis. 392.

We find no basis for the contention upon the various questions presented by contestants that the court was clearly wrong in withdrawing from the jury the inquiry whether or not the will was the product of undue influence. The evidence fails to sustain this claim. As this court has declared:

"Undue influence is the very antithesis of right influence. It exists only where there is practical destruction of voluntary volition,—at least, is moral coercion for an ulterior purpose." *Ball v. Boston,* 153 Wis. 27, 141 N. W. 8; *Anderson v. Laugen,* 122 Wis. 57, 99 N. W. 437.

Since the questions litigated were ultimately decided by the court contrary to the verdict of the jury, the alleged errors of instruction to the jury cannot affect the judgment rendered and need not be considered.

The contestant offered *R. Franklin Nuzum* (the husband

of one of the legatees under the will) as a witness to testify to transactions and conversations by him with decedent and whether he observed that Mrs. Keenan, as he talked with her during her last few years, comprehended or had difficulty in comprehending what he said. All of the evidence was excluded upon the ground that the witness was incompetent. This evidence is also made a ground for contestant's motion for a new trial in connection with the ground of newly discovered evidence and the refusal of the court to grant a new trial, for the reason that ch. 433, Laws 1917, makes him a competent witness. This law became effective June 18, 1917, the day the jury's verdict in the case was rendered. We will consider this testimony in connection with these motions. The alleged newly discovered evidence of Miss Duell is to the effect that she had many personal transactions with Mrs. Keenan from the time of Mr. Keenan's death in 1898 to 1912; that she is a practical nurse and has at times lived with Mrs. Keenan; that she observed Mrs. Keenan manifesting lapses of memory, and that at times she refused to purchase provisions for herself and others at her house, except sauerkraut, on which she persisted in living; that she was unable to understand business affairs for days at a time, and that the witness knows of insanity of her sisters and brothers and facts in Mrs. Keenan's conduct indicating mental incompetency, and that in her opinion she was not mentally competent to comprehend and understand the provisions of the will nor her relations to persons who were the natural objects of her bounty. The transactions, conversations, and opinions sought to be elicited from *Mr. Nuzum* were in substance to the effect that she was not able to understand and comprehend matters and affairs he attempted to bring to her notice; that her memory wholly failed her in matters pertaining to her business, her relatives and who they were, and whether or not they were living, and what provisions she had made for them in the past or by her will,

and similar instances of loss of mind and inability to understand and comprehend ordinary details concerning business and property. There is much testimony of this nature displayed in the record by persons having personal transactions and intercourse with Mrs. Keenan; yet in the opinion of the trial court, when considered in connection with the other testimony in the record, it was not sufficient to overcome the positive testimony showing that Mrs. Keenan had throughout her widowhood actively managed her property and affairs in such manner as to show that she comprehended and understood these affairs and that she had sufficient mental capacity to make the will in question. It is also to be observed that the court was justified in holding that due diligence was not shown in securing the witness Duell. Assuming that the witness *Nuzum* would be competent to testify on a retrial of the cause, we do not consider that his testimony and that of Miss Duell necessarily calls for a different finding by the trial court on the subject of decedent's mental soundness and capacity to make the will than the conclusion arrived at by the court in this trial. Assuming that *Nuzum's* testimony would have been as appellant contends, its exclusion did not constitute prejudicial error in the light of its nature and probable probative value upon the issues litigated.

The argument that the provisions of the twenty-first article of the will indicate that the testatrix had no understanding or comprehension of their legal effect proceeds upon the assumption that they were unnatural, unreasonable, and confer such untrammeled powers on the trustees as no person of sound mind would embody in a will to create a charitable trust. The force of this claim is refuted if the charitable bequest is valid in the law. The contention is made that the trust provisions of the will are void because of their uncertainty, their inherent contradictions which make its execution impossible, and because it attempts to

withdraw the powers vested in courts in the administration of trusts and confer them on the trustees.

The trial court declined to determine the questions thus suggested, declaring they need not be determined in the probate proceeding and could more appropriately be considered thereafter. While this course of the trial may be justified in some cases, we think it appropriate to entertain the questions presented on this appeal in view of the fact that the questions are fully briefed and argued, and determination thereof will avoid further litigation and consequent expense. *Deller v. Deller,* 141 Wis. 255, 124 N. W. 278; *Estate of Judson,* 168 Wis. 361, 170 N. W. 254.

It is insisted that the residuary clause embraced in the twenty-first paragraph is void for uncertainty of devisee or beneficiaries. Discussion of this subject has been most searching and extensive in the cases in this court and anything repeated here would of necessity be in substance but a repetition of what has been stated in those adjudications. Among these cases are the following: *Ruth v. Oberbrunner,* 40 Wis. 238; *Heiss v. Murphey,* 40 Wis. 276; *Dodge v. Williams,* 46 Wis. 70, 100, 1 N. W. 92, 50 N. W. 1103; *Estate of Hoffen,* 70 Wis. 522, 36 N. W. 407; *Hood v. Dorer,* 107 Wis. 149, 82 N. W. 546; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345.

In the *Hood Case* it was held that where by will property is directed and devised for a particular charitable purpose as distinguished from charity generally, with a class within which a trustee can select the beneficiaries and not so indefinite as to be unenforceable, it is a good charitable bequest.

"Given a trust, with or without a trustee, a particular purpose, as education or relief of the poor as distinguished from a bequest to charity generally, and a class, great or small, and without regard to location necessarily, as 'worthy indigent females,' or 'indigent young men studying for the

ministry,' or 'resident poor,' . . . and we have a good trust for charitable uses. The court, through its strictly judicial power, may fill the office of trustee, if necessary. The trustee can select the immediate beneficiaries or objects within the designated class and scheme. He can determine upon the details necessary to effect the intention of the donor within the general limits of his declared purpose, and execute the trust accordingly; and the proper public agencies, if necessary, can invoke judicial power to enforce such execution."

In *Dodge v. Williams* it was said:

"A charitable use is essentially shifting. When a trust defines the beneficiaries with certainty, it is rather private than public. . . . 'It is the number and indefiniteness of the objects, and not the mode of relieving them, which is the essential element of charity.' "

These observations apply and meet every objection urged by appellant against the invalidity of the trust in question. We cannot discover uncertainty or indefiniteness as to beneficiaries, we find no contradiction in the terms of the trust to prevent its enforcement, nor are the powers conferred on the trustees in conflict with the law so as to remove them from the supervision and control of the courts. The uncontrolled discretion conferred on them as to investments and reinvestments is so restricted in the second codicil as to clearly subject them to the control of the court and the statutes and laws governing trustees of charitable trusts. It is considered that the trust embodied in the will is a valid charitable trust and has no legal infirmities that prevent the courts from enforcing its provisions.

We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

MERCHANTS & MANUFACTURERS BANK, Respondent, vs. TERRACE REALTY COMPANY, Appellant.

January 14—March 9, 1920.

Arbitration: Parol evidence to make agreement definite and certain: Abatement of action: Assignments: Acceptance of sum stated subject to specific deductions: Effect: Estoppel: Reliance: Forbearance to sue.

1. In an action on a note, where the defendant pleaded in abatement that there had been an agreement to arbitrate the differences between the parties which had not been carried out, and the correspondence relating to the agreement did not specify the subject matter of the proposed arbitration, it was proper for the court to receive oral testimony of the surrounding circumstances.
2. A property owner which accepted in writing an assignment of an amount due from it to a paving contractor subject to deductions arising from the filing of mechanics' liens, and stated the amount which would be due the contractor in the absence of such deductions, impliedly excluded its right to make any other deductions from the amount stated.
3. Where the assignee of a paving contractor, relying on an acceptance of the assignment by the property owner subject only to deductions for mechanics' liens, extended the time for payment of the contractor's debt to the assignee, its forbearance was sufficient, in such a situation, to estop the property owner from claiming other deductions.

OWEN, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

In August, 1912, the Northwestern Concrete Company entered into a contract with the defendant for laying a concrete roadbed on Cleveland avenue in the village of Shorewood, adjoining Milwaukee, and gave a written guaranty to repair or replace any and all defective work or materials and to keep the concrete bed and job in repair for the term of five years from the completion of the work; and in July, 1914, a similar contract for work on Stowell avenue was made with a similar guaranty.

The same company had also contracts for doing the same

kind of work in Shorewood with the Anderton-Smith Realty Company and Nathanael Greene.

In August, 1914, the Northwestern Concrete Company owed the plaintiff bank about $6,000. This was reduced by December 19th of the same year to $3,500. At that time the plaintiff bank insisted upon security for such account and two notes were executed of $1,750 each, and to secure one of them an assignment was made of all the amounts due the Northwestern Concrete Company from the defendant.

By letter of December 19th the plaintiff requested defendant to consent to such assignment, and on December 24th a letter was written signed on behalf of the defendant by Nathanael Greene, its secretary, and containing the following:

"We hereby accept such assignment, subject, however, to deduction by us for any amounts expended by us in contesting the filing of any liens of any of the materialmen furnishing the material for the work performed by the Northwestern Concrete Company.

"On October 1, 1915, unless there are to be deductions made in accordance with the foregoing paragraph, there will be due $1,703.50."

Thereafter efforts were made by plaintiff to collect on its account, but without success, and nothing was thereafter paid, except that after the Northwestern Concrete Company went into bankruptcy in February, 1916, a dividend amounting to $146.81 was paid on the plaintiff's claim on the two notes.

Before suit was brought a conference was had between the attorneys of the respective parties and subsequent correspondence suggesting the disposing of the question as to whether there was a setoff in favor of the defendant to be applied in reducing the amount of the guaranty.

During such correspondence defendant's counsel suggested appraisers "to determine whether or not there is any

defect in the pavement constructed by the Northwestern Concrete Company and the amount of damage." This was answered by letter saying: "This plan is agreeable to us if we can agree upon the instructions to be given to the appraisers."

Defendant's counsel again writes: "The appraisers shall determine whether or not the pavements constructed by the Northwestern Concrete Company on Stowell place and Beverly road (being Cleveland avenue) were constructed in a first-class and workmanlike manner and shall determine whether or not it will be necessary to repair or replace any defective work or material, or repair the concrete bed and top, under the guaranties, and shall determine the amount of damage, if any," and suggesting that the expense of the appraisers should be paid by the plaintiff if damage was found. Some objection was raised to this last feature, but finally defendant's counsel wrote it was willing to share the expense of appraisers and notified plaintiff's counsel of its selection for one appraiser. The receipt of this is acknowledged, and there is no further correspondence but apparently subsequent communications by telephone and interviews.

At no time at this stage of the negotiation was any specific reference made to the fact that there were guaranties in existence to others than the defendant or that such guaranties included the condition of keeping the work in repair for the term of five years from the completion thereof, and not until later, when copies of the guaranties intended to be relied upon by defendant were furnished to plaintiff's counsel at their request, were such questions disclosed.

Disputes then arose between counsel as to whether the damages were to be assessed as of the date of the appraisal or to include the element covered by the five-year guaranty.

Subsequently this suit was brought in the civil court of Milwaukee county. The defendant interposed a plea in abatement to the effect that there had been an agreement to

arbitrate the questions between the parties which had as yet not been carried out and that the action was therefore prematurely brought.

By reply the plaintiff raised an issue as to whether the proposed agreement for arbitration was upon the basis of the guaranties given to the Anderton-Smith Realty Company as well as upon those given only to the defendant.

The plea in abatement was first tried, and it was held by the civil court that the agreement to arbitrate was not sufficiently definite in its terms to be enforceable, in that it did not specify whether it was to be upon alleged guaranties to defendant alone and as to whether it included the five-year clause, and for those reasons found in favor of the defendant. From the order dismissing the plea in abatement an appeal was taken to the circuit court, and on the hearing before W. J. TURNER, judge of the circuit court, the order of the civil court was confirmed and the record was returned to the civil court to dispose of the case upon the merits.

Trial was then had in the civil court and findings made to the effect that the Northwestern Concrete Company, for a valuable consideration, duly assigned by writing to the plaintiff its account with the defendant.

That by the letter of December 24th, quoted above, plaintiff accepted such assignment as collateral security and relied thereon in renewing the notes of the Concrete Company for the sum of $3,500, and thereby materially altered its position with reference to the collection of the said notes.

That the construction of the pavement in question was defective, and that the defendant suffered damages in excess of $1,703.50 prior to the date of the assignment and within the five-year period referred to in said guaranty.

And upon the conclusions of law he directed judgment in favor of the plaintiff, dismissing the defendant's counterclaims.

An appeal was taken from said judgment to the circuit court and there affirmed, and from such judgment of affirmance the defendant has appealed.

For the appellant there was a brief by *Rix & Barney,* attorneys, and *David A. Sondel,* of counsel, all of Milwaukee, and oral argument by *Carl B. Rix.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, all of Milwaukee, and oral argument by *Mr. Doe.*

ESCHWEILER, J. On the plea in abatement there was a substantial issue of fact raised as to whether there was a definite meeting of the minds of the parties as to the subject matter of the proposed arbitration. The language used in the correspondence between the parties did not definitely specify such points and it was therefore proper to receive oral testimony of the surrounding circumstances in order to make such matters definite and certain, if possible. Upon such evidence the court might properly find that that which defendant's counsel had in mind as being intended to be covered and included by the arbitration was not the same thing as that which was within the contemplation of plaintiff's counsel, and, having found in favor of the defendant on such issue, we see no ground now for disturbing such judgment.

No question is raised but that under the assignment as executed by the Northwestern Concrete Company to the plaintiff and under the provisions of sec. 2606, Stats., the defendant could have successfully interposed as a complete defense to this action by the plaintiff the setoff or counterclaim arising by reason of the breach of the guaranty to defendant by the Northwestern Concrete Company as found by the civil court, except and unless by its letter of December 24, 1915, set forth in the statement of facts above, it is prevented from now asserting such defense.

It is contended by appellant that the letter of December 24th contains no promise to pay the amount of $1,703.50 mentioned therein, and went no further than to acknowledge the correctness of the amount stated of the unpaid account of the Northwestern Concrete Company with the

defendant and the further fact that the bank was by such assignment now the owner thereof, and it is claimed that from the testimony of Mr. Greene, defendant's secretary and the writer of the letter of December 24th quoted above, he intended thereby to say no more than that if there was anything legally due from the defendant to the Northwestern Concrete Company on October 1, 1915, the defendant was willing to pay such amount, if any, to the bank on account of such assignment.

The defendant was under no legal obligation to make any statement whatsoever with reference to the amount due from defendant to the Northwestern Concrete Company or to make any statement concerning the same. Having elected, however, to do so, as embodied in its letter of December 24th, and having therein undertaken to make a positive statement of its accepting the assignment subject to certain possible deductions that might arise by reason of the filing of liens by any materialmen for the work, and that unless deductions were to be made in accordance with such exception there would be a definite sum due on the following 1st of October, it must be held to have thereby, by implication, excluded its right or intention to assert any other possible deduction from such account, and to have given an express recognition of a sum then payable except for the certain contingencies therein mentioned, and this case, therefore, is squarely within the holding in *Batavian Bank v. M., St. P. & S. S. M. R. Co.* 123 Wis. 389, 101 N. W. 687.

As found by the court, the plaintiff, in reliance upon the acceptance of such assignment and upon such assignment, extended the time for the payment of the then existing obligations of the Northwestern Concrete Company. Having so acted, there was sufficient in such a situation to bind the defendant to the statements in its letter of December 24th by way of estoppel.

By the Court.—Judgment affirmed.

OWEN, J. (*dissenting*). I regard the result in this case as exceedingly harsh and one to be avoided unless made imperative upon the plainest considerations. As the result of a courteous, good-faith communication made by defendant to the bank it has been deprived of a valuable right, and this, it seems to me, without consideration moving to it or injury resulting to any one.

The Concrete Company had been indebted to the bank for a long time. The bank had exerted most strenuous efforts to secure a reduction of the indebtedness. When it had been reduced to $3,500 it took the assignment here in question, which represented the very last available asset of the Concrete Company, as satisfactorily appears from the record in this case. Having secured the assignment, it communicated the facts to the *Realty Company*. The letter of Mr. Greene, representing the *Realty Company,* set forth in the statement of facts, followed. Thereafter an extension of time on the indebtedness was granted, and it is said three indorsers of the note of the Concrete Company were released. As I understand the majority opinion it is held that, by reason of the extension of the time and the releasing of the indorsers, the *Realty Company* is now estopped to deny that the amount mentioned in the letter of Mr. Greene is due upon the account. To my mind estoppel does not arise upon these facts. Two essential elements are lacking: (1) the representation as to the amount due upon the account was not made with any thought, much less an intent, that it should be relied upon by the bank in its future conduct or dealing with the Concrete Company. This is an essential element of an equitable estoppel. 16 Cyc. 726; *Norton v. Kearney,* 10 Wis. 443. (2) The bank did not act in reliance upon this representation to its injury. True, it extended the time and released three sureties. But the evidence is conclusive to my mind that it lost nothing by either operation. It had everything that the principal debtor possessed. The Concrete Company went into bankruptcy

soon thereafter. The three indorsers were also bankrupts, and when the bank released them upon the note it surrendered nothing. The result is that the amount of the damages which the *Realty Company* sustained by reason of the defective pavement has been taken from it and given to the bank without any consideration either in law or equity.

This result is also to be regretted from the standpoint of public policy. The only safe course that a debtor can pursue is to decline to give an assignee of the indebtedness any information whatever concerning the status of the account. His courtesies in such respect are likely to react upon him in the form of an estoppel and deprive him of the defenses which sec. 2606, Stats., reserves to him.

The case of *Batavian Bank v. M., St. P. & S. S. M. R. Co.* 123 Wis. 389, 101 N. W. 687, certainly went far enough in implying a promise to pay from a mere business courtesy, and it is to be hoped that this case marks the limit.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, Appellant, vs. BOWERS and another, Respondents.

February 10—March 9, 1920.

Master and servant: Death of employee: Failure to warn employee of danger incident to employment: Evidence: Res ipsa loquitur: Falling of steam coil while being moved: Contributory negligence: Proximate cause.

1. Where the defendants undertook to repair steam coils in the plant of a manufacturing company, and their employee in charge of the work called for one of the employees of the manufacturing company as a helper, and the helper was informed of his duties and the danger incident to the moving of the coils was obvious, it is *held* that the death of the helper by the tipping of one of the coils was not proximately caused by the failure of the defendants to warn and instruct him as to the dangers incident to the work.
2. Where the employee of the defendants was engaged in moving the coil by the application of a pinchbar and the deceased was

holding it steady, the fall of the coil does not, under the rule of *res ipsa loquitur*, establish that the operator of the pinchbar was negligent, as the fall of the coil may have been purely accidental or caused by the failure of the deceased to hold it in an upright position.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Affirmed.*

This action was brought by plaintiff against defendants to recover the sum of $10,000 for alleged negligence. The complaint alleges that the defendants were engaged in the business of steamfitting in the city of Milwaukee, doing business under the name of the Industrial Heating & Engineering Company; that on June 21, 1917, they were engaged in work for the American Malting Company of the same city, moving steam coils for the purpose of putting in a new foundation; that the servants of defendants while engaged in this task called for a helper from the American Malting Company, and one Valentine Jank was sent by his employer to assist the servants of defendants in their work; that this Valentine Jank received his instructions from a vice-principal of defendants, George A. Gerlach, who failed to instruct Jank properly of the dangers incident to the work at hand; that Gerlach negligently caused the coils to slip and fall onto Jank through his negligent manner of applying the pinchbar to move the coil on the I-beam on which it rested and on which it was being moved; that Jank was struck and killed by one of the coils which defendants' servants and Jank were moving.

The complaint further alleges that Alma Jank, widow of the deceased, presented a claim for compensation under secs. 2394—3 to 2394—31, Stats. The claim was assigned to the American Malting Company and from it to the *Zurich General Accident & Liability Insurance Company.* Defendants' answer denied that George A. Gerlach, at the time of the injury to Jank, was the employee or vice-principal of the defendants, and alleges that Gerlach, with an

assistant or helper, was, at the time of the injuries to Jank, hired by the American Malting Company from the defendants by the hour to do such work and perform it in such manner as the American Malting Company might direct. The defendants deny any negligence of Gerlach or their employees or agents which caused the death of Jank. The answer also sets forth the assumption of risk as a defense.

At the close of the trial defendants moved the court to instruct the jury to return a verdict for the defendants. This motion was granted and judgment entered accordingly. Appeal is taken from such judgment.

Joseph B. Doe and *Walter L. Gold,* both of Milwaukee, for the appellant.

Edward W. Spencer of Milwaukee, for the respondents.

SIEBECKER, J. The evidence is clear that the defendants were conducting a business of industrial heating and engineering and that at the request of the American Malting Company they sent Gerlach, one of their employees, to repair the foundation of some steam coils at the Malting Company's plant. The facts show that this repair work was undertaken by defendants and that their agents and employees had full charge of the work and that Gerlach as their employee had control thereof for defendants. The evidence is without dispute that Gerlach, before commencing to move the steam coils preparatory to making the repairs on the floor, informed Jank respecting his duties in helping to move the coils. It is also plain that any danger incident to the operation of moving the coils, from their tipping over, must have been obvious to Jank as well as to the others engaged in this task. We find nothing in the case to sustain a claim that the injury to Jank resulting in his death was proximately caused by the negligence of Gerlach in failing to warn or instruct him as to the dangers incident to the tipping of the coils. The main controversy between the parties centers on the claim that the court erred

in holding that there is no evidence in the case tending to show that Gerlach negligently applied force at the base of the coils by means of a pinchbar for the purpose of moving them along and off from the I-beams to rollers. The second section of the coil which was thus being moved at the time of the accident is described as being composed of five rows of coils, four pipes to each coil, from twenty-five to thirty coils in each row, which were close together. The weight of each section, including its base, is estimated at from 1,400 to 2,000 pounds. They rested on I-beams which were somewhat out of level, so as to cause the coils to slant westward about ten degrees. Gerlach, who was in charge of the moving, used the pinchbar alternately on the north and south ends, applying pressure to the bar, and pinched the coil along the I-beams toward the west. Fewings and Jank stood at the north and south ends of the coils holding them steady and keeping them from wobbling. After Gerlach had pinched and moved the coil on the north end the second time and had stepped around the end near the brick wall to go to the south end, the coil began to tip westward, and continued to do so and fell over. It caught Jank and inflicted the fatal injuries.

It is urged that the evidence tends to show that the fall of the coil is *prima facie* evidence that the force last applied by Gerlach with the pinchbar was done in a negligent manner and hence was the proximate cause of the accident. The testimony does not show that Gerlach used the pinchbar in a way different from the way it had been used by him theretofore; that the manner of handling the pinchbar was dangerous or that he applied pressure in a manner different from the usual way, or that he performed this operation in these or other respects in a negligent manner, unless it can be said that the falling of the coil was due to the negligent manner in which Gerlach was using and operating the pinchbar to move the coil on the I-beams. An examination of all the facts and circumstances of the case fails to disclose

affirmatively that Gerlach negligently handled the pinchbar or applied force thereon to accomplish the moving of the coil, aside from the fact that the coil tipped. In the light of the conditions and circumstances under which this moving operation was being conducted, can it be said that the tipping is proof of the alleged negligence on the part of Gerlach? This we think cannot be said, for the reason that there is nothing disclosed in the manner in which the operation was performed to indicate a want of care, and it is also manifest that the coil may have tipped for want of having been properly held by Jank or kept from wobbling by him, or from his failure to keep it steady in an upright position; nor do the facts and circumstances shown exclude the conclusion that the tipping of the coil may have been purely accidental and independent of what Gerlach did with the pinchbar. In this state of the proof it cannot be held under the rule of *res ipsa loquitur* that the tipping of the coil in itself shows that the moving of it by Gerlach with the pinchbar establishes actionable negligence on his part.

The proximate cause of the tipping of the coil is shrouded in mystery and speculation, and the plaintiff has not established the alleged cause of action. *Hansen v. Milwaukee Coke & Gas Co.* 155 Wis. 235, 144 N. W. 289; *Hotchkiss v. G. B. & W. R. Co.* 153 Wis. 340, 141 N. W. 231; *Stock v. Kern,* 142 Wis. 219, 125 N. W. 447.

By the Court.—The judgment appealed from is affirmed.

MANN and wife, Respondents, vs. BECKER, Appellant.

February 10—March 9, 1920.

Vendor and purchaser: Receipt for part payment as contract of sale: Statute of frauds: Failure to describe property sold: Negotiations on Sunday: Misrepresentations inducing contract completed on secular day: Liability.

1. A receipt for a payment of $20 as security to apply on the purchase price of a house, stating the price and signed by the seller, who appended his own street number, which was not the number of the house sold, was not a contract, and, even if it constituted a contract, was void under the statute of frauds (sec. 2304, Stats.) as failing to describe the property sold.
2. Where negotiations for a contract are made on Sunday, and on a subsequent secular day an act is done by the parties which completes the void Sunday contract, the Sunday negotiations are deemed reaffirmed on such subsequent secular day, and thus form the basis of either validating the void Sunday contract or of showing liability for a tort which induced the execution of the new or completed contract on the secular day.

APPEAL from a judgment of the circuit court for Milwaukee county: EDGAR V. WERNER, Judge. *Affirmed.*

Action to recover damages sustained by reason of false and fraudulent representations made by the defendant as to the quality of lumber and workmanship in a duplex flat purchased from him for $6,000. Plaintiffs' claims are: (1) defendant represented that no old lumber was used in the flat, whereas the fact was that more than 7,000 feet of old lumber were used; (2) defendant represented that the flat was built in a workmanlike manner, whereas the fact was that it was not, but was built in a defective manner. A jury was waived and the action was tried by the court, with the result that it found for the plaintiffs as to both claims and assessed their damages at $800. From a judgment entered accordingly the defendant appealed.

Paul D. Carpenter of Milwaukee, for the appellant.

For the respondents there was a brief by *Schoetz, Williams & Anderson* of Milwaukee, and oral argument by

Orlaf Anderson. To the point that the plaintiffs can recover even though the representations inducing the contract were made on Sunday, they cited: *Blakesley v. Johnson,* 13 Wis. 530, 534; *Sutton v. Wauwatosa,* 29 Wis. 21, 26; *Melchoir v. McCarty,* 31 Wis. 252, 256; *McArthur v. Green Bay & M. C. Co.* 34 Wis. 139, 150; *De Forth v. W. & M. R. Co.* 52 Wis. 320, 325, 9 N. W. 17; *Taylor v. Young,* 61 Wis. 314, 323, 21 N. W. 408; *Schmidt v. Thomas,* 75 Wis. 529, 530, 44 N. W. 771; *Hopkins v. Stefan,* 77 Wis. 45, 45 N. W. 676; *Williams v. Lane,* 87 Wis. 152, 158, 58 N. W. 77; *Gabbert v. Hackett,* 135 Wis. 86, 91–93, 115 N. W. 345; *King v. Graef,* 136 Wis. 548, 117 N. W. 1058; *Gerretson v. Rambler G. Co.* 149 Wis. 528, 532, 136 N. W. 186; *Webster M. Co. v. Montreal River L. Co.* 159 Wis. 456, 459, 150 N. W. 409; *Zielica v. Worzalla,* 162 Wis. 603, 607, 156 N. W. 623.

VINJE, J. The printed case contains over 200 pages of evidence, mostly in the form of question and answer instead of in the narrative form as required by the practice of this court. It is conceded that appellant's attorney has at least a partial excuse for not complying with the requirements of the court in this instance, and is therefore not subject to the criticism he otherwise would be. But the court deems it best to allude to the matter to the end that there may be fewer infractions of the rule in future.

We have carefully examined the evidence both as to the amount of old lumber used in the construction of the flat and as to the defective workmanship therein and are satisfied that it sustains the findings of the trial judge. Indeed, there is evidence to sustain an assessment of damages in excess of that found by the court. It follows that the amount found is fair and just to defendant and cannot be set aside by this court as excessive.

It is admitted that oral negotiations resulting in a sale took place on Sunday, April 25, 1915, and on that day this

receipt, dated the next day, was given: "Milwaukee, Wis., April 26, 1915. Received of *Peter Mann* twenty dollars ($20) as security to apply on purchase price. Price of flat is six thousand dollars ($6,000). *Robert J. Becker,* 2214 Keefe Ave." Number 2214 Keefe avenue was the residence of *Mr. Becker* and was not the number of the flat building sold. The understanding was that it was a cash deal, but plaintiffs were not able to raise the cash and afterwards and on May 12, 1915, a land contract was entered into between the parties providing for future payments, which were made and carried out, and a deed was executed and delivered July 14th of the same year.

The trial court properly held that the receipt did not constitute a contract and that if it did it was void under the statute of frauds (sec. 2304, Stats. 1917) and under the rule stated in *Harney v. Burhans,* 91 Wis. 348, 64 N. W. 1031, and in *Carlock v. Johnson,* 165 Wis. 49, 160 N. W. 1053, and cases there cited, because it failed to describe the property sold.

The completed valid contract entered into by the parties was that of May 12th, which was induced by the fraudulent representations made on Sunday, April 25th. Where negotiations for a contract are made on Sunday, and on a subsequent secular day an act is done by the parties which completes the void Sunday contract, the Sunday negotiations are deemed reaffirmed on such subsequent secular day, and thus form the basis of either validating the void Sunday contract or of showing liability for a tort which induced the execution of the new or completed contract on the secular day. Liability may flow from a Sunday tort, otherwise the sanctity of the Sabbath would become a shield for fraud or wrong. For cases bearing upon this subject, see those cited by the respondents, set out in the report of the case.

By the Court.—Judgment affirmed.

WORDEN-ALLEN COMPANY, Respondent, vs. CITY OF MILWAUKEE, imp., Appellant.

February 10—March 9, 1920.

Municipal corporations: Contract to construct sewer: Lien of materialmen: Sewer as "machinery:" Principal contractor turning materials over to subcontractor for installation.

1. A materialman furnishing steel necessary to carry out a contract with the city of Milwaukee for the construction of a sewer has no lien therefor under ch. 332, Laws 1878, providing that any person that shall furnish supplies or materials in the execution of any contract awarded by the board of public works or the commissioner of public works of the city shall have a lien therefor, where the contract under which the materials were furnished was not one awarded by the board of public works or by the commissioners but by the sewerage commission under sub. (i), sec. 5, ch. 608, Laws 1913, and sec. 8 of the same chapter.
2. Where the contract was awarded by the sewerage commission, a right to a lien exists under sec. 3328, Stats., providing that any subcontractor who has done work or labor or furnished materials to any principal contractor for the construction of any building or machinery may maintain an action therefor, such section not being inconsistent with ch. 332, Laws 1878, creating a materialman's lien under contracts by the board or commissioner of public works, in which case the latter statute is controlling.
3. A sewer is "machinery" within sec. 3328, Stats., giving a materialman a lien for material used in the construction, repair, or removal of any building or machinery.
4. In an action by a materialman against a city to recover for materials furnished, the fact that part of the materials was turned over by the principal contractor to another subcontractor to be installed did not deprive the materialman of his right to a lien where such material was actually used in the construction of the sewer.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The plaintiff entered into a written contract with the Wisconsin Tunnel & Construction Company, hereinafter called the Construction Company, by the terms of which the plaintiff sold to the Construction Company all the steel

necessary to carry out its contract with the city of *Milwaukee* for the construction of a sewer. The Construction Company did not pay the plaintiff, and the plaintiff claims a lien under the provisions of sec. 3328, Stats. Plaintiff commenced action against the Construction Company and the city, and judgment was entered in favor of the plaintiff against the Construction Company for $6,759.65 with interest, and against the city for $5,439.01. From this judgment the city appeals.

For the appellant there was a brief by *Clifton Williams,* city attorney, and *Charles W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

For the respondent there was a brief by *Bottum, Bottum, Hudnall & Lecher* of Milwaukee, and oral argument by *Geo. B. Hudnall.*

ROSENBERRY, J. But two questions are presented by this appeal. First. Is the liability of the city of *Milwaukee* governed by sec. 3328, Stats., or by ch. 332, Laws 1878? Second. If the liability of the city is governed by sec. 3328, is the sewer in question within the terms of that statute?

Ch. 332, Laws 1878, provides:

"... Any person, company or corporation, that shall furnish any supplies or materials, or that may do or perform any labor or services in the execution of any contract awarded by the board of public works of the city of *Milwaukee,* shall have a lien for the amount due for such supplies, ... *provided, however,* such laborer or materialman shall have filed in the office of the city clerk of said city, within twenty days after such claim or demand shall have accrued, a petition or statement in writing, under oath, ..."

It is to be noticed that ch. 332 gives a lien to any person for supplies or materials in the execution of any contract *awarded by the board of public works.* The law was subsequently amended so as to make it applicable to contracts awarded by the commissioner of public works.

The sewerage commission is empowered by sub. (i), sec. 5, ch. 608, Laws 1913, "to make and enter in the name and on behalf of any such city any and all contracts, agreements, or stipulations germane to the scope of its duties and powers under this act."

Sec. 8 of the same chapter provides:

"That all work done or supplies or material purchased in carrying out the purposes of this act when involving the expenditure of two hundred dollars or more shall be by contract awarded to the lowest responsible bidder in accordance with the laws of this state and ordinances then applicable to any such city having reference to the letting of public work by and through the board or commissioner of public works or other proper department in such city."

The plaintiff has no lien under ch. 332, for the reason that the contract under which the materials were furnished was not one awarded by the board of public works or by the commissioner of public works. The class of contracts to which it is applicable having been enumerated, it cannot, under similar rules of construction, be extended to classes other than those specified.

Does sec. 3328 apply? It provides:

"Any subcontractor who has done work or labor or furnished materials to any principal contractor for the construction, repair or removal of any building or machinery for any county, town, . . . may maintain an action therefor . . ."

All the provisions of the statute were admittedly complied with, and the only question presented is that of its applicability to plaintiff's claim. No reason is perceived why the two statutes cannot stand together. They are not in conflict, except as to those contracts let by the board of public works or the commissioner of public works. As to such contracts the provisions of ch. 332 are controlling. It is claimed that the material furnished, which was incorporated into a sewer, was not furnished for the construction, repair, or removal of any building or machinery. The

plaintiff contends that the sewer is machinery within the meaning of that term as used in sec. 3328. That it is not a machine is clear. That the sewerage system of the city of *Milwaukee* is a part of its machinery is established by the authorities. The word *machinery* is of a much broader application and much more comprehensive in its meaning than the word *machine*. In *Comm. v. Lowell G. L. Co.* 12 Allen (Mass.) 75, the court said:

"The mains or pipes laid down in the streets and elsewhere to distribute the gas among those who are to consume it were clearly a part of the apparatus necessary to be used by the corporation in order to accomplish the object for which it was established. They constituted a part of the machinery by means of which the corporate business was carried on, in the same manner as pipes attached to a pump or fire-engine for the distribution of water, or wheels in a mill which communicate motion to looms and spindles, or the pipes attached to a steam-engine to convey and distribute heat and steam for manufacturing purposes, make a portion of the machinery of the mill in which they are used. Indeed, in a broad, comprehensive, and legitimate sense, the entire apparatus by which gas is manufactured and distributed for consumption throughout a city or town constitutes one great integral machine, consisting of retorts, station-meters, gas-holders, street-mains, service-pipes, and consumers' meters, all connected and operating together, by means of which the initial, intermediate, and final processes are carried on, from its generation in the retort to its delivery for the use of the consumers." See, also, 161 U. S. 316, 16 Sup. Ct. 564.

Under sec. 3314, Stats., it was held that a subcontractor who furnished iron pipe to be used in the construction of waterworks, the pipe being laid in the public streets and connected with the hydrants upon the streets and also with the pumping works, was entitled to the lien given by that section. See *Nat. F. & P. Works v. Oconto W. Co.* 52 Fed. 43, and cases cited. The construction which we give sec. 3328 fully effectuates and carries out the legislative pur-

poses; and while the statute is to a certain extent in derogation of the common law, nevertheless it is of a remedial nature, and should be so construed as to accomplish the purpose for which it was enacted.

It is claimed because a part of the steel furnished was turned over to another subcontractor by the Construction Company that the plaintiff is entitled to a judgment for no more than $788. The steel in question was furnished by the plaintiff to the Construction Company and was used by its subcontractor in the construction of the sewer. The fact that it was put in place by another contractor, instead of by the employees of the Construction Company, is immaterial. It was intended to be used and was used for the purposes for which it was sold by the contractor, and under sec. 3328 the subcontractor is entitled to his lien.

By the Court.—Judgment affirmed.

RUBEKEIL, by guardian *ad litem,* Appellant, vs. BOWMAN and another, Respondents.

SAME, Respondent, vs. SAME, Appellants.

February 10—March 9, 1920.

Attorney and client: Substitution of attorneys: Contingent-fee contracts: Lien of attorney who has withdrawn: Allowance of fees by court: Determination of amount.

1. Where during the pendency of an action for damages for personal injuries sustained by plaintiff a substitution of attorneys was made upon the express condition that the right was reserved by the court to ultimately pass upon the question of what allowances should be made out of any fund subsequently to be paid on account of plaintiff's injuries, the allowance made by the court was binding upon the substituted attorneys notwithstanding their contingent-fee contract with plaintiff providing for a greater amount.
2. In fixing the measure of compensation to attorneys the court may properly apply his own knowledge as to the services rendered and the reasonable value thereof.

APPEALS from an order of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

In May, 1918, the plaintiff, *Paul Rubekeil,* an employee of the Chicago & Northwestern Railway Company, was severely injured at Butler, Wisconsin, by having both legs crushed off by a freight train of said railroad.

Raymond J. Cannon was retained by *Rubekeil* to prosecute a claim for damages against the railroad under a written contract, as first agreed and drawn providing for a thirty-three and one-third per cent. contingent fee out of any money recovered. This was changed to twenty-five per cent. by *Rubekeil* before he signed the same. Immediately thereafter considerable time and attention was given by said Cannon and counsel whom he associated with him in examining the place of and the circumstances surrounding the injury, and looking up witnesses, examining some of them before trial; and also attending on a similar examination of said *Rubekeil* and in preparing the case for trial.

Offers of settlement of $4,000 and $4,500 were made on behalf of the defendant and rejected.

On October 9th of the same year *Rubekeil* signed another contract as follows:

"*Paul Rubekeil* having sustained injuries on the 2d day of May, 1918, for which the undersigned claims damages against the C. & N. W. R. Co., a corp., in consideration of the services rendered and agreed to be rendered by *George A. Bowman* and *Horace B. Walmsley,* who are retained and employed as my attorneys authorized to sue and prosecute the cause of action and damages for all of which services I agree to allow and pay 33 1-3 per cent. of the amount settled for, collected or recovered and for which a lien on said cause of action, damages and judgment is hereby given. Court costs are to be paid by the undersigned, but no fees other than the percentage agreed upon are to be paid. No settlement is to be made without my consent."

Written notice of lien under such contract was served on defendant.

Motion was then made on behalf of said *Bowman* and *Walmsley* for an order substituting them as attorneys of record for said *Rubekeil* and several hearings had. It appeared that *Rubekeil,* being without means of his own, could not pay any amount that might be determined to be due his first attorneys and counsel for their services up to that time.

During such proceeding the following question was asked by the court:

"Is it your position that, if you are substituted as plaintiff's attorneys, the contract which has been offered by you, providing that you receive a sum equal to thirty-three and one-third per cent. of the amount settled for, collected, or recovered, shall be the measure of your compensation?"

This was answered by *Mr. Walmsley* as follows:

"Subject to the court's approval; and I want to add this further point: If the court sees fit to allow the counsel whose names are taken from the record some part of that for their compensation in the matter, that is within the power of the court. That is our position."

In response to a question as to whether he intended to ask *Rubekeil* to live up to this contract *Mr. Bowman* answered: "Whatever the court says on that will be satisfactory to me when this case is finally determined."

Rubekeil was informed by the court of his situation and the questions that might arise by reason of the two contracts of retainer providing for contingent fees of twenty-five per cent. and thirty-three and one-third per cent. respectively.

The material part of the order of substitution thereupon entered was as follows:

"It is further ordered that the matter of the compensation for Mr. Raymond Cannon is to be determined when the occasion arises later,—and that the lien of said Raymond Cannon upon the plaintiff's cause of action be and hereby is preserved, the amount of his compensation to be determined later, and that the compensation of the said *Horace B. Walmsley* and *George A. Bowman* shall also be

determined later, and that this order carries no decision or opinion of the court as to the validity, fairness, or reasonableness of either of the contracts which have been put in evidence."

Early in the following month *Rubekeil* began to manifest signs of insanity, and on November 23d he was adjudged insane and committed to an institution.

On November 30th John G. Hardgrove, also a member of the Milwaukee bar, was appointed by the court guardian *ad litem* for said *Rubekeil.* Mr. Hardgrove immediately made a very thorough and exhaustive examination, getting information and assistance from both the former and the substituted attorneys as to the facts and questions of law involved, and himself also took up the question of settlement. An offer of $5,000 had been made to Messrs. *Bowman* and *Walmsley* as such attorneys and they presented the matter to the court. Mr. Hardgrove, however, was not satisfied with such an amount, but subsequently, when the defendant offered the amount of $6,500, recommended its acceptance.

After a hearing the settlement was allowed and confirmed, the amount paid into the court by the railroad company, and it was discharged from further obligation. Thereupon proceedings were had asking for the disposition of said sum of $6,500. The court then made an order directing the following payments to be made:

To Mr. Hardgrove as guardian *ad litem*.....	$250 00
To Mr. Cannon and his associate for services.....	1,000 00
To Mr. Cannon for disbursements.....	88 16
To Messrs. *Bowman* and *Walmsley* for services.....	400 00
To Messrs. *Bowman* and *Walmsley* for disbursements...	11 10
	$1,749 26

and the balance remaining was ordered paid to the general guardian of *Rubekeil.*

From so much of such order and distribution as refuses to allow to Messrs. *Walmsley* and *Bowman* the contingent fee under said contract of one third of the amount paid

into court they have appealed. The guardian *ad litem* also appealed from so much of the order as allows any compensation for services to Messrs. *Bowman* and *Walmsley*. No question is raised by any party as to the allowance made to Mr. Cannon and his associate.

For the plaintiff *Rubekeil* the cause was submitted on the brief of *J. G. Hardgrove* of Milwaukee, guardian *ad litem*.

George A. Bowman and *Horace B. Walmsley* of Milwaukee, *in pro. per.*

ESCHWEILER, J. The allowance made by the trial court of $400 as compensation to the appellants *Bowman* and *Walmsley* for their services in this case can be and is upheld, for the reason that their substitution as attorneys was made upon the express condition that the right was reserved by the court to ultimately pass upon the question of what allowances should be made out of any fund subsequently to be paid on account of plaintiff's injuries. The statements by Messrs. *Bowman* and *Walmsley* on that hearing were in recognition of the right to make such a reservation and they accepted the substitution based upon such order and reservation. It bound all persons concerned and continues to so bind them. No exceptions were filed to such order nor is it before us for review. The action of the trial court in so disregarding the provisions of the several contracts as to the amounts of compensation was therefore proper and renders it unnecessary to determine other questions as to them.

The trial court had sufficient before him to warrant his arriving at his conclusion as to the reasonable value of the compensation of the several parties, and he might properly apply his own knowledge as to such services and their value in fixing the measure of compensation. *Larscheid v. Kittell*, 142 Wis. 172, 125 N. W. 442. We can see no ground for disturbing his determination.

This disposition of the matter makes it unnecessary,

under the position taken by the guardian *ad litem* on this appeal, to consider any other of the questions argued.

By the Court.—The order of the circuit court is affirmed.

CLARK, Appellant, vs. HORICON STATE BANK, imp., Respondent.

February 11—March 9, 1920.

Bills and notes: Note authorizing confession of judgment at any time: Negotiability: Defenses available against transferee: Vendor and purchaser: Agreement of vendor to improve land: Breach: Evidence: Parol proof of consideration of deeds and notes.

1. A promissory note authorizing any attorney to appear for the maker "at any time hereafter, and confess a judgment, without process, in favor of the holder of this note, for such an amount as may be due, and also for any amount to become due thereon," is nonnegotiable, notwithstanding secs. 1675—2 and 1675—5, Stats., the words "at any time hereafter" having reference to the delivery and not to the maturity of the note, and the note is therefore not payable at a fixed or determinable future time within the meaning of sec. 1675—1. *Wisconsin Yearly Meeting v. Babler,* 115 Wis. 289, followed; *Thorp v. Mindeman,* 123 Wis. 149, distinguished.
2. The transferee of a nonnegotiable note takes the note subject to any defenses that might have been properly interposed by the maker if sued by the original payee.
3. Promises by the vendor of land as to plowing and planting it and the construction of a railroad and warehouse thereon, though not sufficient to constitute the basis of an action for fraudulent representations, are nevertheless valid agreements, for a breach of which damages may be recovered.
4. Deeds and mortgages are not such bilateral contracts as foreclose the right of either party to show that the consideration and conditions for and of the contractual relationship between the parties is other than that, or even additional to that, expressed in the deeds or mortgages.

VINJE, J., dissents.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Personal service was made in this action upon the defendant *Horicon State Bank,* which alone appeared and demurred to the complaint. The individual defendants named were served by publication only and no appearance has been made in their behalf.

The complaint in effect seeks to cancel and set aside certain land contracts, deeds, and notes growing out of the purchase by plaintiff of certain lands in what is known as the Horicon marsh, and for the return of $500 paid by plaintiff to the individual defendants.

As against the *Horicon State Bank* it is alleged that it acquired two certain notes for $500 each, executed by the plaintiff to the defendant Oliver as part consideration of such purchase and by the latter disposed of to the defendant bank; that such bank is not an innocent holder thereof for the reason that the said notes are not negotiable instruments and are held by the said bank, therefore, subject to any rights that the plaintiff may be adjudged to have as against the defendant Oliver.

The complaint, which is extraordinarily voluminous, alleges in substance that in June, 1915, after having received information to the effect that the individual defendants prior thereto claimed to be associated together in buying and selling real estate in what is known as the Horicon marsh in Dodge county and were representing to own and control some 13,000 acres, and that such lands were fertile and highly adapted to the raising of onions and other garden products, the plaintiff visited the lands and thereupon purchased ten acres for the sum of $1,500, by $500 being paid in cash and the giving of two notes for $500 each, one due January 1, 1917, and another due the following year, to each of which was attached a form of warrant of attorney to enter and confess judgment upon the same; that such transaction was pursuant to a written contract with the defendant Tallmadge.

That in the following September the plaintiff visited the

lands so conveyed to him and found that the crops growing upon those and the surrounding lands were poor and not in a marketable condition, and that at the same time he learned that the defendant Tallmadge had left the country and that his whereabouts were then unknown.

That in February, 1916, the defendants Oliver and Borchers called on plaintiff and represented, among other things, that the defendant Oliver had acquired the interest of the defendant Tallmadge in the lands on the Horicon marsh; that said Oliver would exchange the lands which plaintiff had contracted to buy from Tallmadge in June for another and more desirable tract on the same marsh for the same price of $1,500; that he would give credit on the same for the $500 cash paid by plaintiff to Tallmadge, and would give up the promissory notes of June and take in exchange two new notes, dating the same back to June 24, 1915, to be secured by a real-estate mortgage upon the lands which he was to convey.

That said Oliver would plow and prepare the said ten acres of land for seeding and seed the same the coming spring, and care for the crops during the season and harvest them.

That said Oliver would build a railroad to said marsh near these lands and also build a warehouse at the railroad station convenient to the lands and have it ready for use in the year 1916 for storing a large amount of onions, and furnish crates for the same, and have all in readiness in 1916 to properly market such crops.

That if from 750 to 1,000 bushels of onions could not be raised on said lands, the defendant Oliver would not charge the plaintiff a cent for the said lands.

That the defendants Oliver and Borchers had issued a pamphlet prior to June, 1915, edited by the defendant Oliver, of some sixty-four pages, entitled "Onions and Independence," containing highly laudatory descriptions of the defendant Oliver as a judge of lands and a successful

onion grower in the state of Indiana, and an alluring picture of what could be done in the raising of onions upon the Horicon marsh; containing calculations showing that on a conservative basis there would be a net annual profit of $720 per acre from the ten acres, or at least an annual average return of three to five times the whole cost of the farm. Also a pen-picture of the warehouse that was to be built for the convenience of the purchasers of this land, the interest he would acquire therein, and the benefits therefrom and the possibilities arising from such a situation, and many other details.

That, relying upon the promises and representations, the plaintiff did take in exchange for the property purchased in 1915 ten certain other acres, and executed the notes hereinafter set forth.

That the individual defendants have absconded from the state of Wisconsin and disposed of their interest, if any they had, to the said lands in the Horicon marsh; that there has been a failure on the part of the defendants to keep their promises and agreements, in that, among other things, they failed to build the railroad; to build and erect a warehouse; to plow and prepare the land for seeding, and to care for the crops.

That the land was not fertile or adapted to the raising of onions and not capable of producing the quantity per acre as claimed.

That no village site has ever been laid out at or near these lands and that the defendants never intended that such should be done, and that all of the promises, statements, and agreements made by defendants to the plaintiff were falsely and corruptly made for the sole purpose of inducing the plaintiff to purchase the lands, pay the $500, and to make and deliver the promissory notes, land contracts, and mortgages.

That if the plaintiff had known, at the time he contracted to purchase and did purchase from the defendant Edward

Oliver, that the promises, agreements, and statements so made to plaintiff, including those in the pamphlet aforesaid, were not true, he would not have purchased the said lands.

To this complaint the defendant bank demurred upon the following grounds:

(1) That it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action.

(2) That it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action against the *Horicon State Bank.*

The trial court sustained the demurrer, with leave to the plaintiff to amend. From such order the plaintiff appealed.

By stipulation between the parties a copy of the judgment notes held by the defendant bank and received by it from the defendant Oliver was made a part of the record as though set forth in the pleadings. The two notes in question were alike, except that the second was payable one year after the first. The first is as follows:

"$500 Horicon, Wis., June 24, 1915.

"On or before Jan. 1st, 1917, after date, for value received, we, jointly and severally, promise to pay to the order of Edward Oliver five hundred dollars, at the *Horicon State Bank* at Horicon, Wis., with interest at the rate of six per cent. per annum after date until paid.

"And to secure the payment of said amount, I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court, in term time or vacation, at any time hereafter, and confess a judgment, without process, in favor of the holder of this note, for such an amount as may be due, and also for any amount to become due thereon, together with costs, and ten dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

"DAVID B. CLARK."

For the appellant there was a brief by *F. F. Wheeler,* attorney, and *E. R. Hicks,* of counsel, both of Oshkosh, and oral argument by *Mr. Hicks.*

For the respondent the cause was submitted on the brief of *Thompson, Thompson & Gruenewald* of Oshkosh.

ESCHWEILER, J. Under sec. 1675—1, Stats., an instrument to be negotiable must be for a sum certain and be payable on demand or at a fixed or determinable future time. Under sec. 1675—2 the sum payable is a sum certain, although it is to be paid by instalments with a provision that upon default in payment of any instalment or of interest the whole shall become due, or although it is to be paid with costs of collection or an attorney fee in case payment shall not be made at maturity.

By sec. 1675—5 the negotiable character of an instrument otherwise negotiable is not affected by a provision which authorizes a confession of judgment if the instrument be not paid at maturity.

The notes in question here authorize any attorney of a court of record to appear for the plaintiff "in term time or vacation, *at any time hereafter,* and confess a judgment, without process, in favor of the holder of this note, *for such an amount as may be due, and also for any amount to become due thereon.*"

We think the reasonable construction under these statutes to be given to this language thus quoted and all of it, omitting no part thereof unless there be cogent reason for so doing, and none so appears here, necessarily implies that the holder of such note is authorized, at any moment after its execution and delivery, to cause judgment to be entered against the maker for any amount still unpaid at such time on the note. We are not justified in construing the clause "at any time hereafter" to mean merely at any time after maturity, nor can we reject as surplusage the phrase "for any amount to become due thereon." The first phrase

speaks as of the time of the execution of the instrument and not as of its maturity. The last phrase relates to a sum not exceeding the face of the note which is not yet due by the terms of the note itself, but is according to its terms to become due thereafter. The right so given to the holder of the note to so enter judgment at any moment after receiving such note is absolutely within his control and beyond the power of the maker to prevent, and therefore it is not payable at a fixed or determinable future time within the meaning of sec. 1675—1, *supra.* The power of attorney involved here therefore renders such note nonnegotiable, and it is squarely within the decision of this court to the same effect in the case of *Wisconsin Yearly Meeting v. Babler,* 115 Wis. 289, 91 N. W. 678. In that case, as appears from the printed case, the portion of the note authorizing an appearance on behalf of the maker read as follows: "in term time or vacation, *at any time hereafter,* and confess a judgment without process in favor of the holder of this note for such amount as may appear to be unpaid thereon, *whether due or not.*" That case was decided after the adoption of the negotiable instrument law as it now appears, and it expressly passed upon sec. 1675—5, above quoted.

A similar conclusion was reached in *Richards v. Barlow,* 140 Mass. 218, 6 N. E. 68, and *First Nat. Bank v. Russell,* 124 Tenn. 618, 139 S. W. 734.

There is nothing in the case of *Thorp v. Mindeman,* 123 Wis. 149, 159, 101 N. W. 417, which conflicts with this ruling, inasmuch as in that case the provision in a real-estate mortgage that on default in case of failure to comply with any of the conditions of the mortgage the whole principal amount should, at the option of the mortgagee, become due and payable, was held not to affect its negotiability, for the reason that such contingency or condition was within the power of the maker to control, which is not the situation in the case at bar.

The note, therefore, being nonnegotiable, the *Horicon*

State Bank took the same subject to any defenses that the plaintiff might have properly interposed against it if sued by the original payee therein, and its demurrer on that ground was improperly sustained.

Were the only question on the complaint as against the individual defendants one as to whether or not it shows sufficient facts upon its face to sustain an action for the cancellation of the instruments in question on the ground of false representations, we fear we should have great difficulty in sustaining it, for the reasons, among others, that the complaint shows that the plaintiff had and exercised the power of examining the lands sold, and that after having made the first purchase in June, 1915, and after the second opportunity to examine the land in question, he made his second purchase, and that the representations upon which he alleges he relied were substantially all as to future rather than as to past or present events. But we do not at this stage of the litigation deem it necessary to finally dispose of that question.

There are allegations in the complaint as to material promises and undertakings made by the individual defendants as to the plowing and planting of the land, harvesting its crops, building a railroad into the property and a warehouse on the same, and possibly others, and of default in so doing.

While such promises might not be sufficient to come within the principles upon which relief may be had in an action for fraudulent representations in the making of a contract, they are nevertheless valid agreements on the part of the individual defendants, or some of them, to do certain things as part consideration for the obligations assumed by plaintiff. For breach of such executory agreements and consequent damages the plaintiff might recover damages.

It appearing, therefore, that the complaint in question does state some cause of action as against the individual defendants, and the defendant *Horicon State Bank* having

taken the notes subject to any deductions therefrom that might properly be made on account of damages that may be found due, if any, from the individual defendants arising out of this transaction, the other ground of the demurrer interposed by the defendant bank was also not well taken.

From the complaint it appears that in the first transaction in June, 1915, a contract was signed by plaintiff and Tallmadge concerning the transaction there involved, providing for the giving of the deed on one side, the notes and mortgages on the other, and a recital that no representations whatsoever had been made as to the nature or character of the land or the soil and its adaptability for agricultural purposes, and that the plaintiff had made his own investigation with reference to all of such matters.

At the time of the second transaction in February, 1916, with defendant Oliver, no such written contract seems to have been made, and the writings comprise the deed on one side, the mortgage and notes on the other.

It is contended that the agreements or promises alleged to have been made by the defendants Tallmadge and Oliver, respectively, at the time of the two contracts, had been merged in the writings and could not be relied upon by plaintiff. It is not necessary to consider at this time what effect if any the first contract between the plaintiff and Tallmadge might have with reference to that situation. The allegations as to the later transaction with the defendant Oliver show the making of no such separate bilateral written contract as in the first instance. The writings in this second transaction are only the deed, the mortgage, and the notes. Deeds and mortgages are not such bilateral contracts as foreclose the right of either party to show that the consideration and conditions for and of the contractual relationship between the parties is other than that expressed in the deed or mortgage, or that it is even additional to that mentioned in such instruments. *Cuddy v. Foreman*, 107

Wis. 519, 83 N. W. 1103; *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Jost v. Wolf,* 130 Wis. 37, 42, 110 N. W. 232; *Illinois S. Co. v. Paczocha,* 139 Wis. 23, 31, 119 N. W. 550; *Borchert v. Skidmore L. Co.* 168 Wis. 523, 526, 171 N. W. 70. The allegations in the complaint as to the other promises than those expressed in the writings and made by defendants as a part of the consideration to the plaintiff for his entering into the transaction with them respectively, could be properly supported by appropriate oral testimony and form the basis of an action for damages.

By the Court.—Order reversed, and cause remanded for further proceedings.

VINJE, J. (*dissenting*). In my opinion the notes in question were negotiable. The power given to confess judgment "at any time hereafter" "for such an amount as may be due, and also for any amount to become due thereon," does not authorize the confession of a judgment until there is something due on the note. When there is, then judgment may be taken for such amount, and also for any amount to become due thereon, but judgment cannot be taken for any amount to become due thereon until there is something due. The note says for such amount as may be due, *and* also, not *or* also, for any amount to become due thereon. Since judgment cannot be taken until a sum becomes due, and since that time is fixed by the note, it is negotiable.

The cases relied upon by the court differ radically in their facts. In *Wisconsin Yearly Meeting v. Babler,* 115 Wis. 289, 91 N. W. 678, judgment could be confessed "at any time hereafter" for such amount as may be *unpaid* thereon, *whether due or not.*" In *First Nat. Bank v. Russell,* 124 Tenn. 618, 139 S. W. 734, and in *Richards v. Barlow,* 140 Mass. 218, 6 N. E. 68, judgment could be confessed "at any time hereafter" "for such amount as may appear to be *unpaid* thereon." It hardly seems necessary to point out the

difference between an amount "unpaid" and an amount "due," especially where, as in *Wisconsin Yearly Meeting v. Babler,* 115 Wis. 289, 91 N. W. 678, the word "unpaid" is sought to be reinforced by the words *whether due or not,* though the latter neither add to nor detract from the meaning of the word "unpaid," which means not paid, whether due or not.

PHILLIPS and another, Respondents, vs. FRATERNAL RESERVE ASSOCIATION, Appellant.

February 11—March 9, 1920.

Insurance: Fraternal associations: Benefit contracts: Default in payment of assessments: By-laws: Self-executing forfeiture clause: Reinstatement: Modification of contract by continued practice: Estoppel.

1. A by-law of a fraternal order providing that upon the failure of a member to pay the assessments his benefit contract shall become void without notice, being a self-executing forfeiture provision, will be sustained.
2. Where a member frequently became delinquent in paying monthly assessments, and each time, with a single exception, his default was relieved within the time and in the manner prescribed by the by-laws, such reinstatements as provided by the contract did not operate to modify it or to estop the association from asserting rights under a self-executing provision in the by-laws for forfeiture in event of delinquency, and, the member having died while delinquent, there can be no recovery on the ground of modification of the contract or of estoppel.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Life insurance. In 1903 the defendant issued a certificate of insurance upon the life of M. C. Phillips, then residing in Oshkosh, but who removed to Chicago in 1913. The insured paid all the assessments due except assessment 145, due July 1, 1916. The defendant's by-laws provide:

"The monthly assessment stated in each certificate assessed to and to be paid monthly by every benefit member

shall be paid without notice during, and applied to, said calendar month not later than 10 o'clock p. m. of the last day of each calendar month."

In this case the time for payment expired July 31, 1916, at 10 o'clock p. m. At 10:45 p. m. July 31, 1916, the insured suffered a stroke of apoplexy, from which he died at 12:45 a. m. August 2, 1916. He was apparently in excellent health and engaged in his usual business down to the moment he was stricken. The by-laws of the defendant provide:

"Any member failing to pay his assessments or dues according to the provisions of the general laws of the *Association,* shall be *ipso facto* suspended from the order, except as otherwise provided herein, and his benefit contract shall thereupon become null and void, by operation of these by-laws, without notice."

On October 25, 1916, the amount of the delinquent assessment was tendered to the defendant.

On the part of the plaintiffs, the beneficiaries under the certificate, it was claimed that the defendant company, by a long course of dealing, had led the insured to believe that a strict compliance with its rules would not be required, and that after the death of the insured the defendant could not declare a forfeiture because of such strict compliance; and it was further claimed that such conduct constituted an estoppel or waiver, and amounted to a modification of the original contract by acquiescence. Upon this branch of the case the court found:

"For years it was the universal custom of the supreme council, upon receipt of these monthly reports [referring to reports made by secretaries of local organizations], to write those shown in arrears or as suspended, calling attention to the delinquency and urging payment and reinstatement. This was followed by other urgent letters and all efforts made to keep members in good standing. The secretary of the local council of which the deceased was a member accepted overdue payments and good-health cards if received

at any time before his monthly report was sent to the supreme council, and such member, instead of being reported suspended, was reported in good standing. In the Oshkosh local [of which the insured was a member] the suspension and reinstatements ran about fifteen per month. That was the rule likewise with most of the local councils. Although required by the by-laws, it was not until three or four years, more or less, before Mr. Phillips' death that the good-health card was required upon reinstatement, but latterly during that time it was insisted on when reinstatement was made during the sixty-day period."

"Deceased was almost constantly in arrears. Up to January, 1916, the local secretary carried Phillips as paid and seldom reported him suspended and reinstated. Phillips lived in Chicago after October, 1913, and frequently wrote from there and elsewhere for his indebtedness, and when advised would pay. January 1, 1916, a new local secretary took charge and had the same experience with deceased. Phillips did not pay his assessment and dues for the months of March, April, May, or June, 1916, when due, but in a letter dated July 1, 1916, remitted for the March and April amounts; on July 3d, after attention had been called to his May and June delinquencies, he paid for May, and on the 11th of July paid for June. Frequently he inquired if he was paid in full. The July assessment was not brought to his notice and was not paid."

As to reinstatement the by-laws provided:

"Any such suspended member may become reinstated upon the order of the supreme secretary by paying to the local secretary within sixty days from the date of such suspension the amounts due, provided he is in good health at the time of such payments.

"A statement and warranty of health of the applicant for reinstatement must be signed by him, attested by the local secretary, and forwarded to the supreme secretary."

There was a further provision that any member failing to be reinstated within sixty days, then might be reinstated upon a new medical examination within six months. Thereafter he must be received as a new member.

It appears from the records of the secretary that the insured was delinquent as follows:

Assessment	117—March, 1914.	Assessment	139—January, 1916.
"	129—March, 1915.	"	141—March, 1916.
"	130—April, 1915.	"	142—April, 1916.
"	134—August, 1915.	"	143—May, 1916.
"	136—October, 1915.	"	144—June, 1916.
"	137—November, 1915.		

In each of these instances the insured was reinstated after the last day of the month on which the assessment was due and within sixty days, except that on assessment 142 the reinstatement was made July 5, 1916, more than sixty days after the date of suspension, by paying the assessment and filing with the secretary of the local council the following declaration, countersigned by the secretary of the local organization:

"I, M. C. Phillips, to whom was issued benefit certificate No. —— by the *Fraternal Reserve Association,* have been suspended by reason of nonpayment of assessment No. —— [here was inserted the appropriate number of the delinquent assessment]. I hereby apply for reinstatement on payment of all arrearages.

"I hereby certify and warrant that I am in good health and not engaged in any prohibited occupation.

"I agree that my reinstatement to membership shall be based upon my original application, which is renewed and confirmed by this warranty. M. C. PHILLIPS."

Upon the findings and undisputed facts the trial court concluded:

"That there had grown up and for years had continued between deceased and defendant the custom and practice of payment by Phillips and acceptance by the defendant of dues and assessments from ten to fourteen days after the last day of each month, contrary to the letter of the by-laws of the defendant.

"That such custom had been substantially universal between said parties, and justified deceased, Phillips, in a reliance upon its continuation at and before the time of his decease.

"That this custom and practice estops the defendant from asserting the so-called automatic suspension of the certificate of deceased, by reason of the nonpayment of the July, 1916, assessment and dues by or before 10 p. m. of July 31, 1916, notwithstanding death ensued on August 2, 1916, before such payment."

Plaintiffs had judgment for the amount of the certificate, $2,000, and from the judgment the defendant appeals.

E. R. Hicks of Oshkosh, for the appellant.

For the respondents the cause was submitted on the brief of *D. E. McDonald* of Oshkosh and *Thos. H. Gill* of Milwaukee.

ROSENBERRY, J. That clause under which the defendant claims the rights of the plaintiffs are forfeited is a self-executing forfeiture provision, and one, therefore, to be sustained by the courts. *Haycock v. Sovereign Camp W. O. W.* 162 Wis. 116, 155 N. W. 923; *Behling v. Northwestern Nat. L. Ins. Co.* 117 Wis. 24, 93 N. W. 800.

The question is whether this positive provision of the contract was, under the circumstances in this case, modified by conduct of the company which was inconsistent with its provisions. *Ramsey v. Travelers' P. Asso.* 147 Wis. 405, 133 N. W. 634, and cases cited. In the *Ramsey Case* the rule is stated thus:

"Where the conduct of an insurance company with reference to strict observance on the part of the assured of the agreement as to payment of dues, or payment in the particular manner stipulated, is such as, naturally to, and that it in fact does, cause the assured to believe that such performance will not be insisted upon, but that variances therefrom, within the limitations suggested by such conduct, will be regarded by the company as sufficient performance to preserve the integrity of the agreement,—it will be conclusively presumed that the minds of the parties met upon that basis, displacing, to that extent, the letter of the contract; this upon the equitable doctrine of estoppel *in pais.*"

If by the conduct of the parties the contract in respect to

forfeiture was in effect modified, or if, what in practical effect amounts to the same thing, the defendant was estopped by its conduct from asserting its rights under the forfeiture clause, then the rights of the beneficiaries under the certificate were never forfeited, and the insured was not delinquent, because the court found, and the finding is abundantly supported by the evidence, that it was the almost universal practice to accept such payments up to the date of the making of his report by the local secretary, which was from ten to fourteen days after the default occurred. Within that period—as a matter of fact within twenty-seven hours of the time of the default—the insured died.

The difficulty with the position of the plaintiffs is that, with the single exception of assessment 142, each default was relieved within the time and in the manner prescribed by the by-laws. How can it be said that reinstatement in the manner prescribed by the contract operates to modify the contract or to estop the defendant from asserting its rights under other clauses of the contract? The forfeiture clause being a self-executing provision, the contract must be given its full effect; that is, the member is suspended when the default occurs, and the policy is not in force until the member is reinstated in the manner prescribed by the by-laws. The insured died before reinstatement was attempted. At the time of his death, by reason of his default, the policy was not in force and the defendant therefore not liable. The insured was an able lawyer and had had a large experience in insurance matters, and must have understood and appreciated the legal consequences of his acts. If he did not, although the result is harsh, we cannot rewrite his contract so as to create a liability where none existed.

If the insured had attempted to reinstate himself in the customary manner a different situation would exist. There is nothing to indicate that the defendant or the insured ever

regarded the contract as in force during the periods between default and reinstatement. No action on the part of an officer of the local organization or of the defendant company was necessary under the terms of the policy to create a forfeiture. Hence it was immaterial whether the insured was reported delinquent or not. If the default existed, the forfeiture occurred.

By the Court.—Judgment reversed, and case remanded with direction to dismiss the complaint.

TOLLEFSON, Respondent, vs. TOLLEFSON, Appellant.

February 11—March 9, 1920.

Landlord and tenant: Duty of occupant of farm to destroy noxious weeds: Recovery of value of work from owner: Permanent improvements: Repairs: Sowing clover: Facts admitted in pleading: Effect: Tender: Appeal: Findings of referee.

1. The findings of a referee supported by the testimony must stand on appeal.
2. An occupant of a farm who, pursuant to sec. 1480, Stats., spent some time in removing mustard weed cannot recover for such work in the absence of any agreement between him and the owner of the farm, the statutory duty to destroy the weed being as absolute upon an occupant of lands as upon the owner.
3. The construction of a small chicken house outside the barn and certain changes in grain bins in the barn made by the occupant of a farm, being repairs or changes for his convenience, are not within an agreement whereby the owner was to pay for "permanent improvements" made by the tenant; neither is the sowing of clover, if primarily for fertilizing purposes, in the nature of a permanent improvement.
4. Formal admissions made in the pleadings as to the amount of rent agreed to be paid should bind the pleader and dispose of the matter in the absence of some showing that would justify disregarding them.
5. Defendant's tender to plaintiff of an amount in excess of that found due him, which was not in form a compliance with the statute or rules of court, does not become material in the disposition of the case.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Modified and affirmed.*

The parties are brothers. In 1914 they discussed plaintiff's moving upon the farm owned by defendant in said county, with the possible end in view of his subsequently purchasing the same. As a result thereof he did take possession in May, 1915, and remained there until the 5th of the following January, when the defendant sold the farm to one Oscar Nimmer. Shortly before plaintiff left the premises a further conversation was had about the possible purchase by plaintiff of the farm and a price fixed for the real estate and the personal property thereon, which price, however, was not satisfactory to the plaintiff and he refused to purchase. There is some dispute between the parties as to just the terms and conditions upon which plaintiff entered upon the premises and upon which he was to have the right to purchase, but whatever it was it was not reduced to writing, and it is conceded by both parties that it was void under the statute of frauds. The plaintiff brought this action for an accounting from the defendant for permanent improvements made by plaintiff while in possession of the farm, and services performed by him for defendant, and for certain personal property belonging to plaintiff left on the farm and turned over to the purchaser by the defendant as part of the sale. Plaintiff alleges that he was to pay $450 and the taxes levied on said premises as annual rent while in possession, and gave a credit in the complaint to defendant for such rent during such possession of the sum of $346.30, and in the reply to defendant's counterclaim it is recited: "Denies that there is a greater sum due to defendant for rent and taxes than the sum of $346.30 as alleged in plaintiff's complaint."

The defendant answered by way of denials and also set up a counterclaim, and the issues raised were submitted to a referee. His report and findings were confirmed by the

circuit court. It in effect allowed items to the credit of plaintiff aggregating $877 and disallowed his claim to the extent of $250; allowed a credit to defendant of $482.55, leaving a balance due plaintiff of $394.45, with interest from March 26, 1917. The referee allowed as credit to the defendant for the rent of the premises but $308.66, being $37.64 less than the amount admitted by plaintiff for such item in the complaint and reply.

From the judgment so entered the defendant has appealed.

The cause was submitted for the appellant on the brief of *Geo. C. Hume* of Chilton, and for the respondent on that of *J. E. McMullen* of Chilton.

ESCHWEILER, J. Certain of the items in the accounts of the parties were either conceded upon the trial or are not questioned on this appeal and need no attention. The plaintiff asserted that there was an agreement between the two that for whatever permanent improvements he made upon the premises while in possession thereof the defendant would pay. The defendant denied any such agreement, but the referee found that there was such made; and there is testimony which will support such a finding and it must therefore stand.

The defendant questions the allowance by the referee of $4.50 for certain cordwood which had been cut and piled by plaintiff, left on the farm by him, and turned over to the purchaser; an item of clover-seed chaff amounting to $50, and a further one for silage amounting to $15, also belonging to plaintiff and at defendant's request left on the farm and turned over to the purchaser. Although there was no express promise made by defendant to pay plaintiff for these articles as there had been for other articles of personal property also turned over to the purchaser and not questioned here, we are nevertheless satisfied from the testimony that it was sufficient to warrant the allowance of these

three items to the plaintiff, inasmuch as they were given at defendant's express request to the purchaser and defendant received the benefit therefrom in his sale.

As to the questioned items for work done by plaintiff on the approach to the barn as well as for cementing its floor, these allowances are also supported by the evidence and cannot be set aside.

While in possession the plaintiff spent five days for which he charged and was allowed $2 per day for removing the mustard from the farm. There was no agreement or mention of this matter between the two parties. Under sec. 1480, Stats., the duty is placed upon the person occupying or controlling, equally with the person owning, lands upon which are growing thistle and mustard, to destroy or cut the same. The statutory obligation, therefore, was as absolute upon the plaintiff to do that work, he then occupying and controlling the land, as upon the owner. There being no agreement between the parties that the defendant should pay the plaintiff for this item of $10, it must be disallowed.

When the plaintiff went into possession he found that the chickens which had been kept there were permitted to roam and roost at will in the barn. He preferred to have them outside of that structure, and at an expense of $16.50 for material and labor erected a small structure as a chicken house on the outside of the barn. He was also not satisfied with the condition of certain bins in the barn which had been used for the storing of grain, and at an expense of $16 for material and labor he changed those and was allowed by the referee for these two items. From the testimony we are of the opinion that neither of these items was such as should properly be classed within the term "permanent improvements" for which the plaintiff should be held liable. They were more matters of repairs or changes for the convenience or to satisfy the taste of the occupant and should therefore be disallowed. 14 Ruling Case Law, 16; *Israel v. Israel,* 30 Md. 120.

The referee also allowed an item of $31 for the purchase price of and labor in sowing clover seed upon the farm. We do not think the plaintiff has satisfied the burden of proof that would be upon him as to this item of showing that it was in the nature of such a permanent improvement as would be recognized as properly allowable to him under the general agreement between the parties. If it were primarily for fertilizing purposes, the general rule seems to be that such is not in the nature of the permanent improvement for which allowance in such cases should be made. 14 Ruling Case Law, 16; 22 Cyc. 5.

The judgment for the plaintiff must therefore be decreased by the total of the three items, amounting to $73.50, that we have thus disallowed.

Apparently the formal admissions made in plaintiff's pleadings as to his obligation to pay rent on the basis of $450 a year rather than $400, and admitting a liability of $346.30 as set forth in the statement of facts, were overlooked on the trial below, and the finding of a credit to defendant of $308.66 for such rent was based upon the testimony of plaintiff that the agreement was to pay rent on the basis of $400 per year rather than $450. The admissions thus made in the pleadings, in the absence of some showing that would justify disregarding them, and none such appear herein, should bind the plaintiff and dispose of the matter. The defendant therefore should be entitled to the difference of $37.64 between the amount allowed by the referee and the $346.30 admitted by the plaintiff.

The plaintiff's judgment therefore should be reduced by the total of these two items of $73.50 and $37.64, or $111.14, which, deducted from the $394.46, the balance found due the plaintiff, would leave the correct amount thereof $283.32, and to that extent the judgment must be modified.

Defendant insists that he made a lawful tender to the plaintiff before the action was commenced of an amount

more than that now found due from him and that it was rejected by plaintiff. The tender, however, was not in such form as to make it a compliance with the statute concerning the same or the rules of court, and it therefore does not become material in the disposition of this case. *Frank v. Frost,* 170 Wis. 353, 174 N. W. 911.

By the Court.—Judgment modified by reducing the amount of damages from $399.46 to $283.32, and as so modified it is affirmed. Appellant to have costs on the appeal.

PUHR, Administratrix, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY and another, Respondents.

February 11—March 9, 1920.

Railroads: Accident at crossing: Automobiles: Stop-look-and-listen rule: Crossing in front of train: Negligence: More than slight want of ordinary care: Failure to stop caused by defective mechanism: Knowledge of driver as to the defect: Contributory negligence: Negligence of driver imputed to occupant.

1. The driver of an automobile who, when approaching a railroad track of which he has an unobstructed view, fails to look for an oncoming train, or who, seeing a train approaching, attempts to cross in front of it, is in either case guilty of more than a slight want of ordinary care.
2. If an automobile driver, observing an oncoming train, proceeds, in ignorance of the defective condition of the stopping mechanism, with the intention of stopping before reaching the tracks, but upon seasonable effort to stop fails to avoid going upon the tracks because of such defect, he is not guilty of any degree of negligence.
3. A driver who approaches a railroad track with knowledge of the defective condition of the stopping mechanism without so decreasing his speed as to be able to bring the automobile to a stop notwithstanding defects, is guilty of more than a slight want of ordinary care.

4. The negligence of the driver of a private conveyance is imputed to a person voluntarily riding therein, and if such negligence contributes to an injury to such person it defeats an action against a third party based on the latter's negligence.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover damages for death by wrongful act. On the 3d day of September, 1916, at about 4 o'clock in the afternoon, plaintiff's intestate, Frank Bauman, his wife, and daughter Theresa were riding in an automobile, from Manitowoc to Two Rivers, owned and operated by Frank Kucera, Mrs. Kucera also constituting one of the party. Within the limits of the city of Two Rivers, and while attempting to cross the railroad track of the *Chicago & Northwestern Railway Company,* the automobile was struck by a passenger train, the car demolished, and all the occupants killed except Theresa. Kucera was a resident of the city of Two Rivers and, presumably, familiar with the crossing. At the point of collision the railroad track extends east and west. The highway upon which the automobile was driven runs in a northeasterly and southwesterly direction, so that the intersection of the railroad track and the highway at the point of collision forms an acute angle. The automobile was coming from the southwest. The train was coming from the east. At a point in the highway 250 feet southwest of the crossing, an unobstructed view of the track could be had for 568 feet east of the crossing, and as the automobile proceeded from that point towards the track Kucera could see eastward along the track for a still greater distance. For instance, at a point in the highway 100 feet southwesterly from the crossing an unobstructed view of the track could be had for 750 feet, and at a point in the highway fifty feet southwesterly from the crossing a view of the track could be had for 900 feet. As Kucera came within view of the track he was driving from twelve to fifteen miles an hour, and from that point to the intersection slowed down to

eight or ten miles an hour. He made no apparent effort to stop the car, but drove right on to the crossing with both hands holding the steering wheel.

Theresa Bauman, the only survivor of the occupants of the car, gave the following version of the accident: She was riding in the back seat, and Kucera asked if there was a car coming behind; he wanted to stop; she rose from her seat to look through the rear window of the car, and just as she rose she heard her father, who was riding in the front seat with Kucera, say "Stop;" and Kucera replied "I can't," and immediately, and while Theresa was standing up to secure a view through the rear window, the collision occurred. Other witnesses testified that they passed the Kucera car between Manitowoc and Two Rivers when it was standing still at the side of the traveled track, and Mr. Kucera was on the ground, with the hood of the car up, looking at the engine. The occupants of another car testified that they also passed the Kucera car on the same highway and that Mr. Kucera was evidently having difficulty in shifting gears, as he had hold of the shifting lever, and they heard a noise as of grating gears. The occupants of a Ford automobile testified that they drove behind the Kucera car for a considerable distance prior to reaching the place of collision and that both cars were running from twelve to fifteen miles an hour; that, while the Ford car stopped before it reached the railroad track, the Kucera car slowed down to from eight to ten miles an hour and ran right on to the crossing where it was struck by the train.

This action was brought by the administratrix of the estate of Frank Bauman, deceased, against the *Chicago & Northwestern Railway Company* and *George Lee,* the administrator of the estate of Frank Kucera, deceased, to recover damages for his death. The jury returned a special verdict in which they found negligence on the part of the railroad company, a slight want of ordinary care on the part of Frank Kucera, and no negligence on the part of

plaintiff's intestate, Frank Bauman. The damages were fixed at the sum of $5,950.

The sixth and seventh questions of the special verdict were as follows:

"(6) In his management and operation of the automobile at the time and place of its collision with the train, was there on the part of its owner and driver, Frank Kucera, any want of ordinary care which contributed to cause the injury and death of Frank Bauman? *A.* Yes.

"(7) If your answer to the sixth question be 'Yes,' then answer this: Was the negligence of Frank Kucera which is found by the answer to the sixth question more than a slight want of ordinary care? *A.* No."

Upon motion made after verdict the court changed the answer to the seventh question from No to Yes, and ordered judgment dismissing the complaint against the railroad company, and ordered a new trial against the administrator for the reason that the damages were excessive. An appeal was taken by the plaintiff from this order, which appeal was dismissed by this court (168 Wis. 101, 169 N. W. 305). After the case was remanded it was, on stipulation, dismissed as to the administrator, and judgment was rendered in favor of the railroad company and against the plaintiff. From that judgment plaintiff appealed.

For the appellant there was a brief by *Hope Thompson* of Chicago and *Kelley & Wyseman* of Manitowoc, and oral argument by *Mr. Thompson.*

R. N. Van Doren of Milwaukee, for the respondent *Chicago & Northwestern Railway Company.*

OWEN, J. It will be observed from the statement of facts that the jury, in answer to the sixth question, found that Kucera was guilty of negligence in his management and operation of the car at the time and place of collision, and that by its answer to the seventh question it found that such negligence was not more than a slight want of ordinary

care. This was material, in view of the fact that the accident occurred within the limits of an incorporated city, as sub. 6, sec. 1809, Stats., provides that under such circumstances it shall not be a bar to a recovery if the person injured or killed was guilty of a slight want of ordinary care contributing to the injury or death. The trial court changed the answer, No, to the seventh question to Yes, and ordered judgment in favor of the railroad company. The question here is whether the circuit court erred in so changing the answer to the seventh question.

It is patent beyond controversy that if Kucera had looked he would have seen the train, therefore he either saw the train or he did not look. If he did not look he was guilty of negligence as a matter of law, and if he saw the train and attempted to beat it across the crossing he was equally culpable. In either case he was guilty of more than a slight want of ordinary care. This situation is recognized by appellant, who contends that the evidence justifies the conclusion on the part of the jury that he did look and did see the train and tried to stop, but could not because his brakes failed to respond. These are the circumstances relied upon to justify such an inference: (a) At one point between Manitowoc and Two Rivers he apparently had trouble in shifting gears; (b) at another point the car was stopped and he was looking at the engine; (c) just before entering upon the railroad track he slowed down from twelve to fifteen to eight or ten miles an hour; and (d) immediately prior to the accident he asked if a car was coming from the rear, and said he wanted to stop. Granting that these circumstances justify an inference that his car was not working right in some particular, they do not even remotely suggest the thought that his brakes, or other stopping apparatus, were out of order. Clearly there is no relation between a defective brake and a grating noise attending the shifting of gears. Neither does an inspection of the engine, with the hood up, suggest trouble with the brakes. The fact that

he slowed down from twelve to fifteen to eight or ten miles an hour as he approached the crossing does not indicate that his brakes were not working, but rather the contrary. Neither does the inference necessarily arise that he slowed down because he saw the train. Some bumps may be expected to be encountered in crossing a railroad track, and most drivers slow down at railroad crossings out of consideration for the car as well as its occupants. His inquiry as to whether any one was coming from the rear, stating that he was going to stop, just a moment before the collision, indicates a calmness and tranquillity of mind not to be expected on the part of one about to collide with a passenger train. It seems inevitable that if he was conscious of the oncoming train and realized that his brakes were not working, he would give evidence of a more excited state of mind than was apparent to the witnesses who had ample opportunity to observe him. It should be borne in mind that he could and should have discovered the train when he was 250 feet from the track. He was then going at the moderate rate of twelve to fifteen miles an hour. The natural instinct would be to slow down at once, and in fact it appears that he did. Upon an attempt so to do he would immediately have discovered the inadequacy of his brakes, upon which discovery he would have done something more to avoid the accident than to steer straight onto the tracks, with both hands on the steering wheel. One would expect him to at least seize the lever of the emergency brake, and, as a last resort, turn from the traveled track and run the car into the ditch, if necessary. If he appreciated the danger that lay directly in front of him, there would certainly have been some manifestation of fright, some exclamation, some warning to the others, some visible effort to prevent the collision in some way. Had he seen the oncoming train he would not have inquired whether any one was coming from behind before attempting to stop. Close as he must have been to the track at the time, if he were

conscious of the oncoming train he would instinctively have exerted every effort at his command for his personal safety and for the safety of the other occupants of the car. All of the circumstances are quite convincing that none of the occupants of the car knew of the approaching train until Bauman said "Stop," and then it was too late for Kucera to stop before reaching the tracks. We are convinced that the learned circuit judge correctly concluded from the evidence that the negligence of Kucera constituted more than a slight want of ordinary care. But whether this be true as a matter of fact, we think it must be so held as a matter of law.

The jury found Kucera guilty of negligence. The question immediately arises, Of what negligence could he be guilty? Manifestly, his failure to look for an approaching train is one thing that would constitute negligence. This negligence, however, could not be termed a slight want of ordinary care. *Todoroff v. C. & N. W. R. Co.* 169 Wis. 554, 173 N. W. 214. Could the defendant have been guilty of negligence in any other particular that would have amounted to no more than a slight want of ordinary care? It is clear to our minds that if he saw the oncoming train when 250 feet, or any other distance, from the tracks and proceeded with the intention of stopping before reaching the tracks, and upon seasonable effort so to do discovered for the first time that the stopping mechanism of the car failed to work, and because of such failure he could not avoid entrance upon the pathway of the train, he would not be guilty of any degree of negligence. On the other hand, if he had prior knowledge of the imperfect condition of the stopping mechanism of the car, it was his duty to approach the track cautiously and at a rate of speed that would enable him to bring the car, in its then condition as known to him, to a stop before reaching the zone of danger, and if, having knowledge of such defective condition of the car, if it existed, he failed to approach the track with that degree of

caution, he was guilty of more than a slight want of ordinary care. The reasons which require men to look and listen before attempting to cross a railroad track equally require the driver of a defective automobile approaching a railroad track to have the car under such control as will enable him to stop before reaching the zone of danger, and if he fails in this regard his negligence is of the same degree as the negligence of one who neither looks nor listens. So that, as we view the situation, Kucera was either guilty of no negligence at all or he was guilty of more than a slight want of ordinary care. The jury found him guilty of negligence. It being determined that the only negligence of which he could be guilty constitutes more than a slight want of ordinary care, the trial court correctly changed the answer to the seventh question from No to Yes.

It is well established in this state that the negligence of the driver of a private conveyance is imputed to persons voluntarily riding with him, and if such negligence of the driver contributes to an injury received by one of such persons while so riding it defeats his action for damages against a third party based on negligence of the latter. *Prideaux v. Mineral Point,* 43 Wis. 513; *Lightfoot v. Winnebago T. Co.* 123 Wis. 479, 102 N. W. 30; *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W. 629. It follows that Kucera's negligence was imputed to Bauman and that the plaintiff in this action cannot recover.

By the Court.—Judgment affirmed.

NELSON, Respondent, vs. BALLESTAD, Executor, Appellant.

February 11—March 9, 1920.

Executors and administrators: Claims against decedents: Evidence: Testimony as to value of services by claimant unfamiliar with customary price: Appeal: Harmless error.

1. In an action against a decedent's estate for services rendered decedent and his wife by their niece, the niece could testify to the value of her services though she testified also that she was not familiar with the value of such services in the neighborhood.
2. Where the amount found for the niece was greatly in excess of an amount testified to by a witness as what she paid her own servant, any error in the admission of such testimony was not prejudicial.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The plaintiff is a niece of Christen Ballestad and his wife, who resided on a farm in Manitowoc county. In 1903, when Mrs. Ballestad was sixty-six years of age and Mr. Ballestad was seventy-three years of age, the plaintiff commenced working for them upon their farm. They continued to work the farm for three years, and after that it was rented, but they kept two cows, a horse, and some chickens. Mrs. Ballestad died April 13, 1915, having been ill about four months. Mr. Ballestad remained in fairly good health until January 26, 1916, when he had a stroke of apoplexy, and died February 1, 1918, in the meantime being practically helpless. The plaintiff filed a claim against the estate of Mr. Ballestad for services rendered between February 1, 1912, and February 1, 1916, four years, $1,500, and for services rendered between February 1, 1916, and February 1, 1918, two years, $1,500. It was the claim of the administrator that the plaintiff had agreed to work for $2 per week, and that she had been fully paid for her services up to the 1st day of January, 1916. There was a trial in the county court, and the county judge found that she had been paid up to January 1, 1916, and allowed her

$1,260 for services rendered after that time. Both parties appealed to the circuit court. There was a jury trial in the circuit court, and by special verdict the jury found (1) that it was not agreed between the plaintiff and Mr. Ballestad in the year 1903 that her services to him should be for the sum of $2 per week; (2) that the reasonable value of the services from February 1, 1912, to February 1, 1916, was $1,456; (3) that the plaintiff had not been paid in full up to the end of the year 1915; (4) that the value of her services for the two years commencing February 1, 1916, and ending February 1, 1918, was $1,508. There were motions to set aside the verdict. The circuit court held that the verdict was not perverse, but held the verdict excessive, and ordered a new trial unless the plaintiff should remit $500. The *remittitur* was duly filed and judgment taken for $2,464, with interest and costs, from which the defendant appeals.

For the appellant the cause was submitted on the brief of *Hougen, Brady & Meyer* of Manitowoc.

E. L. Kelley of Manitowoc, for the respondent.

ROSENBERRY, J. The principal contention of the defendant is that the first and third findings of the jury are against the clear weight of the evidence, and that the verdict is not supported by any competent evidence. The determination of the questions presented requires a careful examination of the record. Without attempting to set forth the facts disclosed in the record in detail, we are of the opinion that there is evidence to support the verdict of the jury, and the same cannot be set aside on the ground that there is no credible evidence upon which it may rest.

It is further urged that the court erred in permitting the plaintiff to testify as to the value of her services, particularly in view of the fact that she testified that she did not know the customary price of such services. A party may testify to the value of services rendered by him, even though

he is not familiar with the value of that kind of services in the neighborhood. Wigmore, Evidence, § 715, and cases cited. It is claimed that the court erred also in admitting the testimony of one Ida Nelson to the effect that she paid her own servant $3.50 per week. The amount found by the jury was so largely in excess of the amount testified to by Mrs. Nelson that the question whether or not the admission of the testimony was erroneous does not arise, as under no circumstances could it have been prejudicial.

By the Court.—Judgment affirmed.

JAMES, Appellant, vs. WOERPEL, Respondent.

February 11—March 9, 1920.

Justices of the peace: Appeal to circuit court: Review without trial.

1. Where plaintiff, on appeal to the circuit court from a judgment of a justice of the peace, filed no affidavit for a trial *de novo* under sec. 3768, Stats., the circuit court was required to give judgment according to the weight of the evidence and the justice of the case, without regard to the finding of the justice and upon the return.
2. Where it is evident from the decision of the trial court that he indulged in the presumption that there was evidence other than that appearing in the transcript, and that he felt bound to affirm the judgment because he was not convinced it was wrong, the appellant was not accorded the review to which he was entitled under sec. 3769, Stats., and the judgment of the circuit court is reversed.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

In justice's court the plaintiff commenced this action upon two causes of action: one for damages claimed to have been done to his automobile while it was in defendant's care and custody in a barn near defendant's garage in Dodgeville, and the other for the failure thereafter to return such car to plaintiff upon his demand.

Defendant denied liability, and evidence was received on both sides. The justice of the peace, there being no jury trial, found for defendant on both causes of action.

The testimony was written out in longhand by the justice and he certified to its correctness in his original return. Subsequently, at plaintiff's request, the justice had the testimony typewritten and certified as to its correctness in a supplemental return. A comparison of the two shows no variation except that in defendant's testimony relating to a conversation with plaintiff as to the purpose for which one McG., who subsequently, in defendant's absence, took the automobile to Madison, was to come and see the automobile with a view to a possible sale of it, the words "and that he, McG., was going to sell the car" were omitted in the typewritten copy.

The plaintiff appealed to the circuit court from the judgment of dismissal, and upon the hearing thereof the circuit judge filed his decision in writing and affirmed the judgment. In the decision appears, among other things, the following:

"The justice seems to have taken down the testimony fairly well, but it is evident that much that was said upon the trial is not before the circuit court, and could not be, as it was taken in longhand with abbreviations. I have looked over the testimony carefully, as written in the first instance with a pen by the justice and later typewritten so that it could be more easily read. . . .

"Of course it is the rule that upon a review of judgment in justice court upon the record the circuit court, unless the determination of the justice court was unsupported by the evidence, must affirm the judgment of the justice.

"I need not go to the extent of following that rule to affirm the judgment; because I am satisfied upon the testimony as reported that the defendant is not responsible for the injury that was done to this 'Overland' auto while it was in the barn. . . .

"Why it was left in Madison does not appear from the evidence, as many other things do not appear upon which

light ought to have been thrown and perhaps was thrown during the trial in justice court."

"It is certain the jury found for the defendant and that judgment was entered accordingly. The jury were better judges of the facts of the case than this court can be now, because they heard all that was said and saw all that was done during the trial.

"I am not convinced that this judgment in the justice court was not right. Therefore let judgment be entered that the judgment of the justice court is affirmed and that defendant recover his costs in this court."

From such judgment of the circuit court the plaintiff has appealed.

M. J. Briggs of Dodgeville, for the appellant.

For the respondent there was a brief by *McGeever & McGeever* of Dodgeville, and oral argument by *James D. McGeever* and *W. C. McGeever.*

ESCHWEILER, J. The plaintiff upon his appeal to the circuit court filed no affidavit under sec. 3768, Stats., for a trial *de novo.* This made it imperative upon the circuit court to give judgment according to the weight of the evidence and the justice of the case without regard to the finding of the justice and upon the return. Sec. 3769, Stats.; *Silvernail v. Rust,* 88 Wis. 458, 460, 60 N. W. 787; *Fintel v. Cook,* 88 Wis. 485, 60 N. W. 788; *Smith v. Norton,* 114 Wis. 458, 90 N. W. 449; *Brunkow v. Waters,* 131 Wis. 31, 110 N. W. 802.

It is evident from his written decision quoted above that in disposing of the appeal he indulged in the presumption that there was other testimony presented to and considered by the justice or jury, as he inadvertently stated, than that found in the transcript. He also evidently felt bound to affirm because not convinced that the judgment of the justice was wrong.

Both of these views as to his duty under this statute were wrong. Failing to give the appellant the statutory right

secured to him, the judgment must be reversed to the end that such a review be had where the law declares it must be had before this court can be properly invoked to review the proceedings. *Luckow v. Boettger,* 140 Wis. 62, 65, 121 N. W. 649.

By the Court.—Judgment reversed, and cause remanded for further proceedings.

PICKARD and wife, Respondents, vs. FARMERS & MERCHANTS BANK OF RICHLAND CENTER, WISCONSIN, imp., Appellant.

February 11—March 9, 1920.

Reformation: Mistake in amount of notes and mortgages: Failure to read instruments: Evidence of mistake.

1. In cases of reformation of written instruments because of mistake, the evidence must clearly show the terms of the oral agreement and that the writings sought to be so reformed do not express such oral agreement but a different one.
2. Where plaintiff applied for a loan from the defendant bank for $11,500, the unpaid portion of the purchase price of land bought by him, but the cashier erroneously inserted $12,500 in the notes and mortgage given for the loan, and the bank paid such amount to the seller, plaintiff is entitled to reformation and adjustment of the rights of the parties in accordance therewith, though he did not read the notes and mortgage given for the loan to ascertain whether they correctly expressed the oral agreement, but relied upon the cashier.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The action was brought by the plaintiffs to reform a real-estate mortgage and notes secured thereby.

On August 6, 1917, the plaintiffs and C. J. Duren came to the defendant bank and at their request the cashier, Mr. Fiske, drew up a land contract by which Duren contracted

for the sale of his farm to *Pickard* for $12,500. *Pickard* was to pay $1,000 down on that day, the balance the following February. The same day *Pickard* borrowed $2,315 from the bank, paid Duren the $1,000, and paid a prior mortgage on his own farm with the balance. Mr. Fiske drew the land contracts for the parties, and *Pickard* inquired about getting a loan from the bank for the remaining $11,500 of the purchase price to be paid to Duren the following February. Mr. Fiske told him that he and other officers of the bank would examine the two farms offered as security for the loan. In the winter this inspection was made by Mr. Fiske and two directors of the bank, and they were satisfied that the security offered was sufficient for the $11,500 loan. On February 2, 1918, *Pickard* came to the bank to perfect the sale and have the deed made out and the mortgage and notes executed. A mortgage and accompanying notes were executed on the same date.

Plaintiff claims that when the interest on these notes was due he learned for the first time that the mortgage and notes were for $12,500 instead of the $11,500 agreed upon. Mr. Fiske claims that on February 2d *Pickard* asked for $12,500. This is denied by plaintiff, who asserts that he and his wife signed the mortgage and notes which Mr. Fiske had prepared for their signature without either reading them or having them read, and that he and his wife were in total ignorance that the notes were for a thousand dollars more than the sum which had been actually agreed upon as a loan from the bank. Both parties agree that *Pickard* at no time actually handled the money loaned by the bank; that the bank at the request of Duren and *Pickard* cleared up some incumbrances against Duren's land and paid the sum remaining to Duren.

The case was tried to the court. After hearing the evidence the court found that Mr. Fiske by mistake directed that the notes and mortgage to be given the bank for the loan be drawn for $12,500 instead of $11,500, the amount

agreed upon theretofore, and that plaintiffs were not negligent in signing them without first reading them or having the same read to them. The court also ordered that the mortgage signed by the plaintiffs in favor of the defendant bank be reformed so as to read that the same is security for $11,500 instead of $12,500, and that the defendant bank recover of the defendant C. J. Duren the sum of $1,000 with interest thereon from April 6, 1919, at six per cent., with costs. It was further adjudged that the note which matures last, which is secured by the mortgage signed by plaintiffs, shall be reduced in amount to the sum of $1,000, and that plaintiffs recover costs and disbursements. This is an appeal from such judgment.

For the appellant there was a brief by *Burnham & Black* of Richland Center, attorneys, and *Jones & Schubring* of Madison, of counsel, and oral argument by *O. D. Black* and *E. J. B. Schubring.*

For the respondents there was a brief by *Lincoln & Brewer* of Richland Center, and oral argument by *F. L. Brewer.*

SIEBECKER, J. In cases of reformation of written instruments for mistake the evidence must clearly show the terms of the oral agreement and that the writings sought to be so reformed do not express such oral agreement but a different one. *Harter v. Christoph,* 32 Wis. 245, and cases cited; *Green Bay & M. C. Co. v. Hewitt,* 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

There is no dispute in the evidence but that it was agreed between the plaintiff *Charles A. Pickard* and the officers of the bank, at the time the land contract was executed in August, 1917, that plaintiff applied for a loan from the bank for $11,500, if the bank officers upon inspection approved of the proffered mortgage security, and that the bank's officers thereafter informed plaintiff that the security was satisfactory and that he could have the loan. The bank

claims that this agreement was modified on February 2, 1918, to the effect of increasing the amount of the loan to $12,500. This the plaintiff denies. The conflicting evidence on this point sustains the trial court's conclusion that it clearly appeared that the amount of the loan originally agreed upon was not changed by the parties on February 2d to $12,500. The terms of the oral agreement were thus established, and it is understood that the notes and mortgage do not express it. The court's finding that the erroneous amount of the loan, namely $12,500, was inserted in the notes and mortgage through the error of the cashier, Mr. Fiske, is abundantly supported by the testimony. Upon this state of facts of the case plaintiffs are entitled to a reformation of the notes and mortgage unless they are precluded from such relief by their negligence in executing the notes and mortgage in the form presented to them without informing themselves of their actual contents. It appears that Mr. Fiske was requested and instructed by plaintiff to draw up the notes and mortgage for the loan. The facts and circumstances disclose that the plaintiff did what is common in a transaction of this nature, namely, that he and his wife relied upon their banker to draw up these documents correctly and that they expressed the agreements which were well understood between them, and that they relied upon him for their being correct as presented to them and that the contents of the writings contained the terms of the oral agreements. Under these facts and circumstances the omission of plaintiffs to read the notes and mortgage before signing them is sufficiently explained and excused, and the plaintiffs were justified in signing them without reading them to ascertain whether they correctly expressed the oral agreement for the loan. *Silbar v. Ryder,* 63 Wis. 106, 23 N. W. 106; *Wisconsin M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777; *Loyd v. Phillips,* 123 Wis. 627, 630, 101 N. W. 1092.

By the Court.—The judgment is affirmed.

ESCHWEILER, J. (*dissenting*). The oral agreement between the parties for a loan was in August, 1917. When they met again in the following February the plaintiffs relied entirely upon their supposition that the cashier of the bank would remember what took place in August and do not at such time mention that the loan is to be $11,500 rather than the $12,500, an amount which was a subject of conversation in the preceding August. This evidently was the plaintiffs' one transaction of such kind or magnitude. It is fair to assume that the bank had many similar transactions with others in the interim. That there was no actual fraud perpetrated by the cashier in having the instruments drawn with the incorrect amount, is clear beyond question. That he should not have the transaction of August clearly in mind and therefore make the mistake, is quite natural and excusable. The plaintiffs, however, in a transaction which was to them unusual and of much importance, did not do that which this court has repeatedly declared it is necessary and proper that he who binds himself by his signature to a written instrument is bound to do, viz. know its contents at the time of subscribing it in the absence of improper means by the other to prevent. There were absolutely no such means used in this case. There was no inquiry by the plaintiffs as to the contents of this document and the several notes. Plaintiffs were devoting their entire day to the transaction and had ample time and opportunity to look and read and thus have prevented what is probably a loss of $1,000.

To me it is clear that this loss should fall upon the more careless of the two parties concerned, and there was such a plain, inexcusable want of ordinary care on the part of plaintiffs as to place the loss upon them rather than upon the bank. *Dowagiac M. Co. v. Schroeder,* 108 Wis. 109, 111, 84 N. W. 14; *Standard M. Co. v. Slot,* 121 Wis. 14, 23, 98 N. W. 923; *Kruse v. Koelzer,* 124 Wis. 536, 541, 102 N. W. 1072; *Grant M. Co. v. Abbot,* 142 Wis. 279, 290, 124 N. W. 264; *Eland State Bank v. Mass. B. & I. Co.* 165 Wis. 493, 498, 162 N. W. 662.

BISHOP, Appellant, vs. BISHOP and others, Respondents.

February 12—March 9, 1920.

Compromise and settlement: Adjustment before action brought: Misrepresentations: Reliance: Settlement in absence of attorneys.

1. Though a quitclaim deed by which an intervening defendant transferred a $12,000 interest in his father's estate to the plaintiff, his brother, for $400 may have been procured by fraud and undue influence, a settlement between the brothers before the commencement of litigation to determine the validity of the deed, pursuant to which settlement plaintiff paid intervener $5,600 in addition to such $400, was binding, and not the result of undue influence and misrepresentation of a material fact.
2. Such a settlement was not void because made in the absence of the attorneys of the brother who gave the deed and finally agreed to take $6,000 for a $12,000 interest in the estate which was conveyed by the deed.

APPEAL from a judgment of the county court of Iowa county: J. B. SIMPSON, Judge. *Reversed.*

Action to set aside a deed on the ground of fraud and undue influence, the issue being tendered by answer and counterclaim in an action for partition. The following are the facts: James S. Bishop died intestate in Iowa county, Wisconsin, in the year 1895, seized of 280 acres of land in that county. He left surviving his widow, Mary S. Bishop, and five children, *Richard,* Alfred, *Augusta, Frederick,* and *Horace V.* In 1905 Mary S. Bishop, the widow, died intestate, leaving her surviving as her sole and only heirs at law her five children above named. In 1917 the son Alfred died intestate. He was unmarried, and left him surviving as his only heirs at law the three brothers and sister above named. After the death of James S. in 1895, his wife, Mary S., and the three children, Alfred, *Augusta,* and *Frederick,* remained in possession and continued to occupy the

farm until 1905, and thereafter the premises remained in the possession of the three children, Alfred, *Augusta,* and *Frederick,* until Alfred's death in 1917.

On the 4th day of May, 1881, *Richard Bishop* executed to James Bishop, his father, a quitclaim deed of the premises above mentioned. It was believed by *Richard* as well as by each and every member of the family that by such quitclaim deed *Richard* cut himself off from his heirship therein.

Sometime in the month of September, 1918, *Horace V. Bishop,* with a view of bringing partition proceedings, consulted a lawyer to examine the title. The lawyer advised *Horace* that the deed of 1881 did not operate to deprive *Richard* of his rights in the premises as an heir of his father. This was a surprise to *Horace,* and it is doubtful whether he believed it. He soon thereafter went to Oxford, Nebraska, where *Richard* lived with his daughter and her husband, and for $400 secured from *Richard* a quitclaim deed of the premises and an assignment of all his interest in Alfred's estate. It is claimed that this deed was procured by fraud and undue influence. It is certain that at this time *Richard* was under the impression that he owned no interest in the premises, believing that the deed of 1881 operated to deprive him of any right therein. *Horace* then commenced an action of partition against *Augusta* and *Frederick,* claiming a one-half interest in the premises, and alleging that *Frederick* and *Augusta* owned a one-fourth interest each. *Frederick* and *Augusta* answered, denying that *Horace* had any interest in the farm, claiming that he had received his share of the father's estate, specifically denying that he was the owner of a one-half interest in any event, and alleging that said *Horace Bishop* had no right, title, or interest in the premises.

On the 25th of November, 1918, the court made findings declaring the rights of the parties to the action, wherein it

was found that *Horace* was the owner of a one-half interest in the real estate, and the premises were ordered sold. On the 11th day of January, 1919, the premises were duly sold, report of such sale made to the court, and notice that an application for the confirmation of the sale would be made on the 23d day of January, 1919, was served on the attorneys for *Frederick* and *Augusta*. The hearing of this application was successively adjourned until the 25th day of February, 1919. Upon this date *Richard Bishop*, through his attorneys, Fiedler & Fiedler, who were also attorneys for *Frederick* and *Augusta*, made application to the court to be made a party to the action, which application was based upon certain affidavits and a proposed answer and counterclaim in which it was alleged that the deed which he had executed to *Horace* on October 7, 1918, had been procured by fraud and undue influence. A judgment was entered confirming the sale, modifying the order of November 25th determining the rights of the parties in the premises, permitting *Richard* to intervene, and directing that the net proceeds of the sale, amounting to $50,168.25, be divided into five equal parts, one part to be paid each to *Frederick, Horace, Augusta,* and to *Horace* as administrator of the estate of Alfred Bishop, deceased, and the other part to be deposited with the clerk of the court to abide the further determination of the court as to whether *Horace* or *Richard* was entitled thereto. *Horace* replied to the answer or counterclaim of *Richard Bishop*, in which it was alleged that the quitclaim deed of October 7, 1918, was procured by fraud and undue influence, denying the allegations of the answer in such behalf, and affirmatively alleging that on the 22d day of February, 1919, said *Horace* and *Richard Bishop* had fully settled the controversy growing out of the claim on the part of *Richard* that the deed of October 7, 1918, had been procured by fraud and undue influence.

The case went to trial upon the issues thus formed, and from the evidence adduced on this trial it appears that on

the 25th day of January, 1919, Ernest C. Fiedler of Fiedler & Fiedler went to Oxford and interviewed *Richard;* informed him that he was an equal heir with the others in his father's estate; that the interest which he conveyed away by the deed of October 7th was of the value of $12,000. *Richard* claims this was the first time he ever knew that the deed of 1881 had not deprived him of his interest as an heir in his father's estate, although he realized soon after the execution of the deed of October 7th that he was an heir of Alfred and that he had a one-fourth interest in Alfred's estate. *Richard* authorized Fiedler to commence an action against *Horace* to set aside the deed of October 7th. Upon his return to Wisconsin Fiedler communicated to *Horace* and his attorneys the fact that he had been employed by *Richard* to commence an action to have the deed set aside. Mr. McGeever, one of the attorneys for *Horace,* went to Oxford, Nebraska, on February 6th in an effort to bring about a settlement of the action which *Richard* proposed to bring against *Horace.* His visit was unsuccessful. On the 22d day of February *Horace* himself went to Oxford, Nebraska, called at the home of *Richard's* daughter, where he lived, and spent most of the day in talking a settlement with *Richard,* in the presence of his daughter and her husband. An agreement of settlement was finally reached, by which *Horace* agreed to pay *Richard* $5,600 in addition to the $400 paid for the deed of October 7th, gave him a check for $1,600, his note for $4,000, and *Richard* executed to him another quitclaim deed. Both parties telegraphed their lawyers that the case was settled. Upon or before the trial of the case the check and note were tendered to *Horace,* and upon his refusal to accept the same they were delivered to the clerk of the court, to be held by him for the use of *Horace,* and *Richard* repudiated the settlement, claiming that it also was the result of fraud and undue influence.

The trial court found that the deed of October 7, 1918, and the settlement of February 22, 1919, were both pro-

cured by fraud and undue influence and were void and of no effect; that *Richard Bishop,* as heir of James Bishop, deceased, was entitled to his share of the funds of the estate in the hands of the clerk of the court and was likewise entitled to one fourth of the net amount for distribution of the estate of Alfred Bishop, deceased. From the judgment entered pursuant to such findings *Horace Bishop* appealed.

For the appellant there were briefs by *McGeever & McGeever* of Dodgeville, attorneys, and *Miller, Mack & Fairchild* of Milwaukee, of counsel; and the cause was argued orally by *J. G. Hardgrove* of Milwaukee and by *J. D. McGeever* and *W. C. McGeever.*

For the respondents there was a brief by *Fiedler & Fiedler* and *R. T. Jackson,* all of Mineral Point, and oral argument by *Mr. E. C. Fiedler* and *Mr. Jackson.*

OWEN, J. We shall not consider whether the quitclaim deed of October 7th was procured by fraud or undue influence, because we are convinced that the settlement of February 22d must stand, and the fraudulent character of the transaction of October 7th accordingly becomes immaterial.

The findings of the court are replete with recitals of mere evidentiary matters, and it is difficult to understand upon what ultimate fact the trial judge based his conclusion that the settlement of February 22d was obtained by fraudulent representations. If it can be sustained at all, it must be by virtue of the following, quoted from the findings:

"On said day *Horace* falsely and fraudulently misrepresented to the said *Richard* that the latter's share did not amount to $12,000, but amounted only to $10,000; that the litigation would be very expensive and entail heavy costs; that if the case went to the supreme court, depositions or affidavits could not be used there, but that *Richard* and the witnesses would have to appear personally before the supreme court; that the sheriff would have to come from Iowa county to Oxford, Nebraska, to subpœna the witnesses,

and that after attorney's fees, witness fees, railroad fares, and court costs were paid, *Richard* would not have more than $6,000. *Horace* exhibited a paper with a number of figures on it, and insisted that *Richard's* gross share was only $10,000, when in fact it is $12,000."

The only portion of that recital which can be said to constitute the misrepresentation of an existing material fact is this: *Horace* exhibited a paper with a number of figures on it and insisted that *Richard's* gross share was only $10,000, when in fact it is $12,000. The figures referred to were taken from the order of the court confirming the sale, and it is not disputed that they were correct. But it is difficult to see how this incident could form the basis of a material misrepresentation. It may be conceded that he argued from the figures presented that *Richard's* share is only $10,000, when in fact it is $12,000. But this was only an interpretation of that portion of the court's order, and such interpretation was neither believed nor relied on by *Richard*. When asked if he relied on this representation, *Richard's* answer was "No siree." The talk about court costs and what would ultimately be left did not constitute a misrepresentation of existing facts. It was nothing but "dealers' talk," so to speak, and there is not the slightest reason to believe that it influenced *Richard's* action in making the settlement.

Coming to the question of undue influence, the finding of the court is as follows:

"I find that *Richard* is a man past seventy-eight years of age. He is very deaf. He is in failing health, mentally weak, easily influenced, and incompetent to enter into a transaction of any importance. For many years he has suffered from rheumatism and kidney trouble. He has had a number of fainting spells, and has at times become suddenly dizzy and unconscious. His memory is poor. He is at times unable to recall from day to day recent happenings. He is easily excited, decidedly eccentric, quite nervous, and singularly susceptible to influence. He is a man of practically no education, has had very little business experience, and is not conversant with the ways of the world. *Richard*

has very little property. He has four children of his own and a stepson, all of whom are in poor circumstances.

"I find that *Horace* is a man sixty-three years old. He is in good health, and is a shrewd business man. He owns a farm of 400 acres in Iowa county, Wisconsin, is a director in the Cobb State Bank, and has been engaged in farming and handling stock, and has transacted a great deal of business. When he was a boy he went to school at different places and for a time attended the Mineral Point high school. *Horace* impresses me as a man of strong will and a person who is far superior to *Richard* in intelligence, and one disposed to exert undue influence upon *Richard* for the purpose of securing an undue advantage over the latter; and that he did exercise and exert an undue influence over *Richard* in inducing the latter to execute the deed and assignment on October 7th and the so-called settlement paper on February 22d; that *Richard* did not understand or comprehend either transaction."

A consideration of this branch of the case will require a discussion to some extent of the evidence which it is urged justifies the finding, and in this connection it should be said that *Richard* did not appear in court as a witness upon the trial of the action; his evidence, as well as that of the witnesses who testified in his behalf, having been submitted in the form of depositions, so that the trial court did not have the usual advantage over this court in meeting the witnesses face to face. His impressions as to character, etc., the same as ours, must result from a consideration of the printed word. At the outset, we have no quarrel with the suggestion that *Horace* was a man disposed to exercise undue influence if by so doing he could further his own interests. Whether the conduct of *Horace* in procuring the deed of October 7th, by which, for $400, he secured property of the value of from $10,000 to $12,000, can be condemned in law, the motives which prompted him to accept the fruits of that transaction were extremely selfish, and fall far short of the standard set by the Golden Rule or considerations of becoming brotherly conduct. So far as his

part in that transaction is concerned, whether it can be condemned in law, it falls far short of good morals. But we are dealing now solely with the transaction of February 22d and the question of whether *Richard's* acquiescence in the settlement of that date was the result of undue influence. While not denying the disposition of *Horace* to exercise undue influence for the accomplishment of his purposes, we are strongly impressed that *Richard* was not susceptible thereto.

When *Horace* first learned that *Richard* contemplated bringing an action to set aside the deed of October 7th he sent his attorney, Mr. McGeever, to Oxford for the purpose of securing a settlement with *Richard*. This was on February 6th. Mr. McGeever spent practically an entire day with *Richard* in discussing the matter. While Mr. McGeever no doubt employed nothing but legitimate argument and honorable means to bring about a settlement, we may believe that the cause of *Horace* was forcibly and persuasively presented to *Richard* and that cogent reasons were urged upon him for making the settlement which Mr. McGeever then proposed. We find that in this interview *Richard* was abundantly able to take care of himself and his own interests, and that he was by no means a child or a man easily handled or influenced. To each of the propositions put forward by Mr. McGeever, to quote *Richard's* own testimony, the reply was, "Nothing doing." McGeever having failed to arrive at an understanding with *Richard, Horace* himself went there on the 22d day of February, 1919. At no time was *Horace* alone with *Richard*. The matter was discussed in the house in the presence of *Richard's* daughter and her husband, and the testimony is that *Richard* conducted the discussion in his own behalf. He says he was half sick and half mad. This is a very natural temper for a brother to be in under the circumstances. *Horace* produced the figures that he had taken from the court's order, and from them attempted to convince *Richard* that his interest was only $10,000. Now *Richard* had never seen these

figures before and knew nothing about them, but he was sufficiently intelligent and awake to point out to *Horace* that according to those figures his share was $12,000, and his own testimony is to the effect that he neither believed nor relied upon what *Horace* said in this particular. They talked for the greater part of a day, and *Richard* remained immovable. *Horace* made no impression upon him, and, feeling that further discussion was useless, he started to go. Then it was that the daughter of *Richard* spoke to her father and said: "He is going to go. Now you better make up your mind." From this circumstance it is quite evident that the daughter felt that he ought to make a settlement, but *Horace* was about to go, and she was solicitous lest he should leave and the opportunity to settle go with him. She had been a listener to the entire discussion. She had neither taken part in it nor coached her father. Neither had her husband. They no doubt had an interest in *Richard* and an interest in the controversy, yet they felt he was entirely competent to cope with the situation and did not intrude. He yielded neither to the arguments, persuasion, or influence of *Horace,* but stood firmly until *Horace* was about to go, when, at the suggestion of his daughter, he said to *Horace:* "Now what is your best proposition?" *Horace* said: "You have already had $400. I will give you $5,600 more, making $6,000 in all," and *Richard* promptly said, "I will take you up."

Now this is the sum and substance of what occurred, according to the testimony of *Richard,* his daughter, and her husband, and from it we find no basis for a conclusion, which must rest upon clear and satisfactory evidence, that *Richard* was induced to make the settlement because of undue influence exercised upon him by *Horace.* A perusal of his deposition does not picture him as a weak and childlike man. On the contrary, it gives the impression of intelligence and self-reliance. He shows a ready and unusual understanding of the questions asked. His answers are

prompt, terse, and straight to the point, and at times give evidence of most remarkable memory, especially as to details. His own testimony is:

"I was in sound mind on February 22d and I understood what this Exhibit B was [the release]; I knew what it was that I was signing; I did it of my own free will. *Horace* did not threaten me if I did not sign this; he did not force me to sign it; he did not deceive me into signing this on February 22d. My decision to accept $5,600 came after a conversation with my daughter."

What is this if not a deliberate assertion of his competency and a denial of any unfair dealing on the part of *Horace?* His daughter said:

"He seemed to be relieved after this signing; he said he was glad it was settled, although he did not consider it just. I consider that sometimes father may be competent to transact business involving an amount of $10,000 or $12,000, but I do not know whether he was competent to transact such business on the 7th day of October. I would not testify that he was not. On the 22d day of February he seemed to be competent to transact such business. By saying not competent at all times I mean that there are times when he is absent-minded and not feeling well, don't seem to really realize everything as he should; but he was not in that condition on either the 7th day of October, 1918, or the 22d day of February, 1919, that I know of."

The findings of the court with reference to his physical infirmities bear little relation to his mental competency or his power to withstand influence. The same or similar findings could be made with reference to the average man of seventy-eight years of age, and it seems to us that they should be accorded very little significance in determining the question of his susceptibility to influence.

More than this, we are impelled to say that, in our opinion, the terms of settlement raise no suspicion of undue influence. We are impressed that *Richard* made a settlement that was satisfactory to him and that his bargain was not a bad one. On the day after Mr. McGeever returned

from Oxford, Mrs. Burton, the daughter of *Richard,* with whom he was living, wrote to her Uncle *Horace,* referring to the visit of his attorney the day before, in which she said: "Father says for me to tell you that if you will send $4,600 to the Security State Bank at Oxford for him he will settle. You are to pay all expenses also." Here we have a well-considered proposition coming from *Richard* following a discussion with Mr. McGeever, after opportunity for reflection and consideration. Certainly that offer was not the subject of misrepresentation or undue influence. When *Horace* came out to see him the matter was argued fully. He met argument with argument. He stood his ground to the last, and when *Horace* had despaired of arriving at a settlement and was about to go *Richard* called for his best offer, and, upon receiving it, promptly accepted. We must remember that it was not a gilt-edged promissory note or a government bond of the value of $12,000 that he was compromising for $6,000. He had given a deed which he was seeking to impeach for fraud and undue influence; that he would succeed was certainly a matter of some doubt. He knew the facts and circumstances surrounding the execution of the deed better than any one else. He was in a position to bring rugged common sense to bear upon the facts as he knew them and to arrive at an intelligent layman's conclusion in the premises. He might well have preferred the $6,000 in cash to the uncertain prospects of a $12,000 lawsuit, the fruits of which he might not live to enjoy. He was a man seventy-eight years of age. A stubborn legal contest stood between him and recovery. He lived many hundred miles from the place of trial. There would be months of worry and anxiety. He was at law with his brother. Conceding that he felt the justice of the cause, we but recognize the ordinary instincts of human nature when we attribute to him a desire to have the matter settled and over with. His daughter said: "He seemed to be relieved after this signing; he said he was glad it was

settled, although he did not consider it just." Who can say that it is not a settlement that would have been made by a man of the strongest faculties, in view of the circumstances which then confronted *Richard?* That it is an unreasonable settlement is not obvious to our minds.

It is claimed that the settlement is void because it was made in the absence of *Richard's* attorneys. *Watkins v. Brant,* 46 Wis. 419, 1 N. W. 82; *Bussian v. M., L. S. & W. R. Co.* 56 Wis. 325, 14 N. W. 452; *Voell v. Kelly,* 64 Wis. 504, 25 N. W. 536; and *Konrad v. Zimmermann,* 79 Wis. 306, 48 N. W. 368, are cited to sustain the proposition. These cases do not go to the extent of impeaching a settlement made between brothers, where the transaction is as free from the taint of unfair dealing as here. The law favors amicable adjustments of controversies, and family disagreements constitute no exception to the rule. All society deplores family quarrels. Amicable adjustments, reconciliations, and restorations of family ties should be sincerely encouraged. Courts should endeavor to preserve rather than seek to destroy the fruits of brotherly conference and adjustment.

To impeach this settlement requires clear and satisfactory proof of unfair dealing. The evidence falls far short of this quantum. We feel satisfied that the findings of the trial court are against the preponderance of the evidence. *Richard* should be denied the relief prayed for, and the rights of the parties should be left as determined in the order of November 25, 1918.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment in accordance with this opinion.

SIEBECKER, J., dissents.

WILL OF MCGINTY.

February 12—March 9, 1920.

Wills: Permission to appeal to circuit court from order admitting will to probate: Discretion of court.

1. An application to the circuit court for leave to appeal under sec. 4035, Stats., authorizing the circuit court to allow appeals from the county court by a person who omitted to take his appeal according to law, without fault on his part, is addressed to the sound discretion of the court, and the supreme court will not reverse an order denying such an appeal unless it appears that such discretion was abused.
2. The rule of *Groner v. Hield,* 22 Wis. 200, that if the petition for leave to appeal states a *prima facie* case counter affidavits will not be considered, has been modified by subsequent decisions; but every application to permit an appeal is addressed to the discretion of the circuit court.
3. On the record and papers accompanying an application by attorneys, to whom an absent heir had intrusted his business affairs before leaving, to permit an appeal in order to show that the testatrix was mentally incapable of making a will, it is *held* that the conclusion of the circuit court that justice does not require a revision of the judgment of the county court is warranted by the evidence.

APPEAL from an order of the circuit court for Waushara county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Alice McGinty died September 23, 1918, at Wautoma, leaving surviving Thomas Bagley and *John Bagley,* her only heirs at law. Thomas Bagley disappeared many years ago and has not been heard from for more than fifteen years, but has never been adjudged legally dead. On October 26, 1918, *Katherine Tyler* applied to the county court of Waushara county for allowance of the will of Alice McGinty. Due notice was given, and the will was admitted to probate on the first Tuesday of November, 1918, there being no appearances at the hearing except on behalf of the proponent. After the expiration of sixty days and on May 9, 1918, application was made by Fisher & Cashin, as attorneys for *John Bagley,* for an order allowing an appeal from the order of the county court admitting the will to

probate. Upon the hearing the petition was denied, and from the order denying the petition this appeal is taken.

For the appellant there was a brief by *Fisher & Cashin* of Stevens Point, and oral argument by *W. E. Fisher.*

For the respondent there was a brief by *E. F. Kileen* of Wautoma, attorney, and *Goggins, Brazeau & Goggins* of Grand Rapids, of counsel, and oral argument by *Mr. B. R. Goggins* and *Mr. Kileen.*

ROSENBERRY, J. It appeared that *John Bagley,* upon whose behalf the petition was made, had not been heard from since the death of Alice McGinty, and there is nothing to indicate that *John Bagley* knew of the will prior to his disappearance or that he has learned of it since that time. The circuit court's decision in denying the petition is as follows:

"The authority to make this petition for the relief asked for as set forth in the petition is that '*John Bagley* left all of his matters to the care of the said firm of Fisher & Cashin as his attorneys.'

"Mr. Redfield testified that he last saw *John Bagley* the latter part of May, 1918; that *John Bagley* then knew of his uncle's death and wanted Mr. Redfield to go with him to Sioux Falls. That he talked with Mr. Redfield about his uncle's death and his inheritance from him. That they arranged to go to Sioux Falls together. That *John Bagley* said that he wanted him to look after all of his affairs. That the only affairs he was talking about was his property and his inheritance from his uncle, and the Portage county litigation over the money evidenced by the certificates of deposit given by the Citizens National Bank of Stevens Point in the joint name of Kate Bagley and Alice McGinty.

"This can only mean that *Bagley* meant that they, his attorneys, should take care of his interests as they were. It constitutes no authority to his attorneys to commence this proceeding.

"*Mr. Bagley* may now be dead. The presumption is, however, that he is alive. If he should return he might approve and ratify what has been done, or he might not

The executor of the will and the residuary under the will should not be subjected to the hazard of such a venture. That the attorneys felt the moral obligation to make the attempt justifies them, perhaps, in commencing as they have; but that consideration will not warrant the court in permitting the appeal to be taken.

"Admitting the authority of the attorneys for the purpose of considering the mental capacity of the testatrix:

"*It is held* that the showing of the executrix is such that it is extremely doubtful that this court would, in the exercise of its discretion, be sustained in holding that the appeal should be allowed under the statute on the ground of the alleged mental incapacity of Alice McGinty."

The application was denied.

The application was made under the provision of sec. 4035, Stats.:

"If any person aggrieved by any act of the county court or commissioners to examine claims shall, from any cause without fault on his part, have omitted to take his appeal according to law the circuit court of the same county may, if it shall appear that justice requires a revision of the case, on the petition of the party aggrieved and upon such terms and within such time as it shall deem reasonable, allow an appeal. . . ."

An application to the circuit court under the provisions of this section is addressed to the sound discretion of the court, and this court will not reverse the order of the circuit court denying such appeal unless it appears there has been an abuse of discretion. *Gustafson v. Whitney Bros. Co.* 154 Wis. 8, 141 N. W. 1008. See, also, *Deering H. Co. v. Johnson,* 108 Wis. 275, 84 N. W. 426; *Perry v. Scaife,* 126 Wis. 405, 105 N. W. 920; *McKenney v. Minahan,* 119 Wis. 651, 97 N. W. 489; *O'Hara's Will,* 127 Wis. 258, 106 N. W. 848.

We have carefully examined the record and papers upon which the application was made, and are of the opinion that the circuit court was right, and that the evidence not only sustains but warrants the determination that justice does

not require a revision of the determination of the county court. No useful purpose would be served by an extended statement of the facts. We have given the matter careful consideration, and although in this case there was no trial, the rule of *Groner v. Hield,* 22 Wis. 200, has been modified by subsequent decisions. In *McKenney v. Minahan,* 119 Wis. 651, 97 N. W. 489; *Perry v. Scaife,* 126 Wis. 405, 105 N. W. 920, and *Will of Stark,* 149 Wis. 631, 134 N. W. 389, applications were granted where there was no trial, but in these cases it is distinctly held that the application is addressed to the sound discretion of the circuit court.

By the Court.—Order affirmed.

E. WEINER COMPANY and another, Appellants, vs. FREYGANG and another, by guardian, and another, Respondents.

February 13—March 9, 1920.

Workmen's compensation: Proximate cause of death: Refusal to follow treatment prescribed by physician: Evidence: Industrial commission: Findings of fact.

1. In proceedings for compensation for the death of an employee alleged to be due to a bruise on the shin, the defense being that the proximate cause of death was the refusal of deceased to follow the treatment prescribed by his physician, the evidence is *held* to support a finding of the industrial commission that the accidental bruise was the proximate cause of death.
2. If there is any evidence to support the award of the industrial commission it cannot be set aside.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from an award of the *Industrial Commission.* At the times hereinafter mentioned Robert Freygang was in the employ of plaintiff *E. Weiner Company.* Both were under the provisions of the workmen's compensation act. On April 27 or 29, 1918, Freygang sustained a bruise to

his shin. By May 1st the bruise had become infected, and Dr. Harder was called to treat him. He saw him regularly two or three days in succession and once or twice thereafter. He discontinued treating him on May 6th because, as he says, Freygang refused to follow his treatment. On May 7th Dr. Boerner was called, who caused Freygang to be removed to a hospital, where he died on May 14th.

The guardian of the minor children of the deceased filed a claim with the *Industrial Commission* for compensation. An award of $2,946.39 was made by the *Commission* against the employer and its insurer, *General Accident, Fire & Life Assurance Corporation.* In an action brought to have said award set aside, the circuit court for Dane county entered judgment affirming the award. From that judgment the employer and the insurance company appealed.

For the appellants there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

OWEN, J. Appellants contend that the testimony taken before the *Industrial Commission* conclusively shows that the proximate cause of the death of Robert Freygang was his unreasonable refusal to submit to and follow the treatment of his physician, and that there is no evidence to support the finding of the *Commission* to the effect that the injury sustained by him on the 27th or 29th day of April was the proximate cause of his death.

The legal principles involved were recently treated in *Banner C. Co. v. Billig,* 170 Wis. 157, 174 N. W. 544, to which this case is quite similar, and need not here be restated. The only question that need be considered is whether there was any evidence to support the finding of

the *Commission* that the accident was the proximate cause of the death. The evidence shows that on the 1st day of May Dr. Harder first called upon and treated Freygang. He found an infected abrasion of the leg. He prescribed antiseptic treatments and bandaged the wound. The doctor claims that Freygang kept the bandage on for only two days, and on the third day removed it and told the doctor that he would not use his treatment any more. He examined Freygang's leg then, and the infection had spread above the knee. He told Freygang he thought there was an abscess on the knee and that he ought to go to a hospital and have it opened up. Freygang refused to listen to his advice. Between May 1st and May 6th he called on him five times. On May 6th he made a last effort to induce him to follow his treatment, and because he would not do so he declined further to treat him. On May 7th Dr. Boerner was called and Freygang was removed to the hospital and was thereafter regularly attended by Dr. Boerner.

Appellants contend that because Freygang refused to follow the treatment prescribed by Dr. Harder the infection resulted in death, the proximate cause of which was such refusal of said Freygang and not the accident. In order to sustain this contention it must appear (1) that the undisputed evidence discloses that Freygang did unreasonably refuse to follow the prescribed treatment, and (2) that had he followed it death would not have resulted. An examination of the record convinces us that there was evidence to support a finding either way upon these two questions. While Dr. Harder testifies that he refused to follow his instructions, one Edward W. Klotz, who lived upstairs in the same house with Freygang, testified positively that he did religiously follow the treatment prescribed by Dr. Harder. Upon the second question, three physicians testified that the treatment prescribed by Dr. Harder was proper treatment and that had it been followed death probably would not have resulted. That is the most than can

be claimed for the medical testimony. We do not think that upon this testimony the *Commission* was compelled to find that had the treatment been followed death would not have resulted, which is but a corollary to a finding that the refusal of Freygang to follow the treatment prescribed by the doctor was the proximate cause of death. It is well settled that if there is any evidence to support the award of the *Industrial Commission* it cannot be set aside.

By the Court.—Judgment affirmed.

NINNEMAN, by guardian *ad litem,* Appellant, vs. INDUSTRIAL COMMISSION and another, Respondents.

February 13—March 9, 1920.

Workmen's compensation: Child of divorced father contributing $10 per month not wholly dependent on father: Evidence: Judicial notice as to amount necessary to support boy: Industrial commission: Findings of fact: Costs in actions to review compensation cases.

1. Under sub. 3 (c), sec. 2394—10, Stats., providing that a child under the age of eighteen years shall be conclusively presumed wholly dependent on the parent with whom he is living, and that in case of divorce the charging of the full support and maintenance upon one of the parents shall constitute a living with such parent, a boy whose care, custody, maintenance, and education were awarded to his mother by a divorce decree requiring the father to pay her $10 per month for his support, maintenance, and education was not wholly dependent on the father.
2. The court may take judicial notice that $10 a month will not support and educate a nine-year-old normal boy.
3. Under sec. 2394—19, Stats., the findings of the industrial commission are conclusive when supported by credible evidence.
4. Under sub. 1, sec. 2394—22, Stats., the action of the trial court in awarding costs against plaintiff in an action to set aside an award of the industrial commission cannot be disturbed, in the absence of an abuse of discretion.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an award of the *Industrial Commission* for $575 in favor of the plaintiff and against the *Mineral Point Zinc Company* growing out of the death of plaintiff's father while an employee of such company. The *Commission* found that plaintiff was only partially dependent upon his father for support and made the award accordingly. Plaintiff claims he was wholly dependent upon his father for support and that the award should have been more. The circuit court affirmed the award, and plaintiff appealed.

Alfred Bushnell of Madison, attorney, and *David Gardner, Jr.*, of Platteville, guardian *ad litem*, for the appellant.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman*, assistant attorney general; for the respondent *Mineral Point Zinc Company* a brief by *Kopp & Brunckhorst* of Platteville; and the cause was argued orally by *Mr. Gilman* and *Mr. A. W. Kopp*.

VINJE, J. On January 18, 1918, plaintiff's father and mother were divorced and the "care, custody, maintenance, and education" of the plaintiff, a boy about nine years old, were awarded to the mother, and the father was adjudged to pay her ten dollars per month "as and for the support, maintenance, and education" of the plaintiff. At the time of the divorce plaintiff's parents were conducting a hotel at Rewey and the mother continued to conduct it thereafter.

Plaintiff's dependence upon his father is claimed to be established by sub. 3 (c), sec. 2394—10, Stats., which provides that the following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employee:

"A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he or they are living at the time of the death of such parent, there being no sur-

viving parent. In case of divorce the charging of the full support and maintenance of a child upon one of the divorced parents shall be held to constitute a living with the parent so charged. . . ."

The circuit court's opinion upon the issue is so concise and apt that we adopt it as our own. It says:

"The single question presented is whether a divorce decree which awards 'the care, custody, maintenance, and education' of the plaintiff to the plaintiff's mother and directs that the plaintiff's father, the deceased employee, pay $10 a month to the plaintiff's mother 'as and for the support, maintenance, and education' of the plaintiff, is one that charges 'the full support and maintenance' of the plaintiff upon his deceased father, within the meaning of sub. 3 (c), sec. 2394—10, of the Statutes."

The plaintiff's mother testified that the sum of $10 paid by the plaintiff's father monthly was not enough to pay for plaintiff's board and room alone, to say nothing of other expenses incident to his support and maintenance. Under such a state of the record the *Commission* could not have found that the court granting the decree charged the deceased father with the "full support and maintenance" of the plaintiff.

The court, by awarding "the care, custody, maintenance, and education" of the plaintiff to his mother, clearly imposed upon her the duty of supplying all support and maintenance in addition to that supplied by the contribution of $10 monthly by the father.

We need only add that in this age of high cost of living we can take judicial notice of the fact that $10 per month will not support and educate a nine-year-old normal boy. The *Commission* and the trial court correctly found the facts and applied the law.

Claim is made that the award is wrong upon the *Commission's* theory of the law. This arises through an attack upon the findings of the *Commission* as to the amount contributed by the father to the son the year preceding his

death. The *Commission's* findings are conclusive unless unsupported by any credible evidence. Sec. 2394—19; *Milwaukee C. & G. Co. v. Industrial Comm.* 160 Wis. 247, 151 N. W. 245. Here the evidence favors the findings made, and they must stand as verities.

There was no abuse of discretion on the part of the trial court in awarding costs against the plaintiff, and in the absence of an abuse of discretion this court cannot interfere. Sub. 1, sec. 2394—22.

By the Court.—Judgment affirmed, without costs to any of the parties, except that plaintiff will pay the clerk's fees in this court.

STATE EX REL. MILLER, Respondent, vs. BAXTER, Mayor, and others, Appellants.

February 13—March 9, 1920.

Municipal corporations: City of Superior: Power of mayor to remove police officer to reduce force to that authorized by council: Board of police and fire commissioners: Powers: Motive of council in enacting ordinance.

1. The power of the mayor of the city of Superior, under its charter (Laws 1891, ch. 124, sec. 22), to designate the members of the police force to be discharged so as to conform to an ordinance reducing the force, is not affected by the police and fire commission law, the power conferred on the board of police and fire commissioners by sec. 959—40*m*, Stats., to organize and supervise the police department, being applicable only to cities of the third and fourth classes, and the power of the board, under sec. 959—45, to remove a policeman being for cause only.
2. The motive of the common council in enacting an ordinance is not a proper subject of judicial inquiry; it is enough that the council had the power under the city charter and acted in the manner prescribed by law.

APPEAL from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Reversed.*

The city of Superior is a city of the second class, under a special charter (ch. 124, Laws 1891). In January, 1912,

the city adopted the commission form of government, and in April, 1918, the defendant *F. A. Baxter* was elected mayor of the city. The city has a board of police and fire commissioners, created pursuant to the provisions of the police and fire commission law (sec. 959—40, Stats. 1917). The board of police and fire commissioners have adopted rules and regulations for the management and control of the police department. The relator was duly appointed a member of the police department of the defendant city on September 1, 1910, and was on May 29, 1915, promoted to police sergeant. In May, 1919, an ordinance was prepared, introduced, and passed by the common council reducing the number of policemen by eighteen. The defendant *Baxter,* as mayor of the city, on May 19th caused the relator, one detective, and ten patrolmen to be discharged, and their services were dispensed with after May 20, 1919. In October the relator, upon petition, secured an alternative writ of *mandamus.* Return was made, the relator answered the return, and upon the issues so made there was a trial by the court. The relator was awarded a peremptory writ, restoring him to his office, and from the judgment in favor of the relator the defendants, except Vincent McKinnon, chief of police, appeal.

For the appellants there was a brief by *R. I. Tipton,* corporation counsel, and *T. L. McIntosh,* assistant corporation counsel, and oral argument by *Mr. Tipton.*

For the respondent there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

ROSENBERRY, J. The important question presented by this record for our consideration is this: In whom was the power vested, upon the reduction of the city's police force by ordinance adopted by the common council, to designate the members who should be discharged therefrom so as to conform to the ordinance? On the part of the relator it is

claimed that such power of designation was vested in the police and fire commission. On the part of the appellants it is contended that such power was vested in the mayor of the city of Superior.

It was conceded upon the argument that the power to determine the number of policemen is by the terms of the city charter vested in the common council. That part of the city charter which defines the powers and duties of the mayor is as follows (sec. 22, ch. 124, Laws 1891):

"The mayor shall be the chief executive officer, the head of the fire department and the chief of police of the city. He shall take care that the laws of the state and the ordinances of the city are observed and enforced, and that all of the officers of the city discharge their respective duties. . . . He shall appoint all watchmen, firemen and policemen, and may remove, suspend or reinstate any watchman, fireman or policeman in his discretion."

As the chief executive officer of the city it must be conceded that the mayor, prior to the adoption of the police and fire commission law, had full authority in a case such as is presented by the facts in this record to discharge members of the police department to conform to the regulations adopted by the common council. The question arises: Has this provision of the city charter been repealed or the power of the mayor been diminished by the enactment of the police and fire commission law?

It is not claimed that the provisions of the city charter have been expressly repealed. Sec. 959—41 provides that the chief of police and the chief of the fire department shall be appointed by the board of police and fire commissioners, and no person shall be appointed to any position either on the police force or in the fire department without the approval of said board. It requires the board to keep the names of all persons who have been approved by them for appointment in the various departments. Sec. 959—42 provides that the board shall cause rules and regulations to

be prepared and adopted governing the election of persons for appointment or promotion in either the police force or fire department. Sec. 959—44 provides that the common council shall by ordinance fix the salaries of the officers and men. Sec. 959—45 provides for the suspension or removal of policemen or firemen. The police and fire commission law, being a general act intended to govern the whole subject to which it relates, and to embrace the entire law in relation thereto, must be held, when applicable, to supplant the provisions of the city charter which apply to a single case, and are earlier in time. In specifying the powers of the board of police and fire commissioners the legislature, by sec. 959—40*m*, provided that in cities of the third and fourth classes the commission should have power to organize and supervise the police and fire departments in accordance with certain provisions of the statute. But we are cited to no provision of the statute, and we find none, which confers upon the board of police and fire commissioners in cities of the second class this supervisory power. The fact that such powers are conferred upon cities of the third and fourth classes, and withheld from cities of the second class, which are not included in the provisions for cities of the first class, leads almost irresistibly to the conclusion that the legislature did not intend that the board of police and fire commissioners in cities of the second class should have such supervisory power. No authority is conferred by the sections of the statute creating a board of police and fire commissioners which are applicable to cities of the second class upon the board of police and fire commissioners of cities of the second class to act under the circumstances disclosed by the facts in this record. Removals by the board can be made for cause only. The discharge of the relator was not a removal within the meaning of that term as used in the police and fire commission act. The office which the relator had occupied no longer existed.

We are of the opinion that the provisions of the police

and fire commission act applicable to cities of the second class were not intended to and did not vest in the board of police and fire commissioners supervisory control over the police and fire departments of cities of that class. Neither did the enactment of the police and fire commission law operate to diminish the power conferred by the city charter upon the mayor, excepting in the respects mentioned. It took from him the power of appointment and the power of removal where removal is for cause. It is significant that the general power of supervision is withheld from the board of police and fire commissioners in cities of the second class, but conferred upon cities of the third and fourth classes. In view of that fact the court must conclude that the legislature intended to withhold from the board of police and fire commissioners of the cities of the second class supervisory powers and to confer only those powers expressly enumerated. None of the provisions of the police and fire commission law is applicable to the situation presented by the facts in this case. We find no such power conferred. It must therefore remain where it was vested by the city charter, namely, in the hands of the mayor. The discharge of the relator was therefore valid and he is not entitled to reinstatement.

In the relator's reply to the return of defendants the relator alleges that the reduction in the police force and the dismissal of the relator was not in good faith, and the trial court found:

"That the relator was not dismissed from the service of the city in the interest of economy or for the purpose of having the police force reorganized by the board of police and fire commissioners, but was dismissed for the purpose of evading the provisions of the act of the legislature creating said board of police and fire commissioners."

The trial court also said:

"There is no question touching the preparation, introduction, and passage of this ordinance [the ordinance reducing the number of policemen] which is open to judicial inquiry."

If the common council acted in the exercise of a power vested in it by the charter and in the manner prescribed by law, its motive in enacting the ordinance in question is not a proper subject of judicial inquiry. *State ex rel. Rose v. Superior Court,* 105 Wis. 651 (81 N. W. 1046), at p. 677.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the petition.

LIQUIDATION OF CITIZENS SAVINGS & TRUST COMPANY: KAUFER and others, Respondents, vs. JOHNSON, State Treasurer, Appellant.

February 13—March 9, 1920.

Banks and banking: Liquidation of savings and trust company: Securities held by state treasurer: Jurisdiction of circuit court to order their surrender to commissioner of banking: Appeal: Filing of brief by depositor in company: Questions considered.

1. In proceedings to liquidate a savings and trust company, an order by the circuit court to the state treasurer, directing him to pay to the commissioner of banking a certain sum of money out of securities belonging to the company and held by the treasurer under secs. 1791*d* to 1791*i*, Stats. 1898, to be used to satisfy claims against the corporation, such order being necessary and proper to carry out the liquidation proceedings, constituted ample warrant for the state treasurer in making such payment, notwithstanding sec. 2024—77*j*, Stats. 1917, requires that such securities shall, during the existence of the corporation, remain in the state treasurer's possession until otherwise ordered by a court of competent jurisdiction.
2. A claim made by one who was a depositor of the company prior to the time that it came under the provisions of ch. 186, Laws 1909, that the order fails to make proper provision as to the rights of such depositor at the time of the deposit, will not be considered or passed upon, as the record on this appeal does not present these questions.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

In July, 1897, what was subsequently known as the Citizens Savings & Trust Company was incorporated under the provisions of secs. 1791*d* to 1791*i*, Stats., as they then stood, with a capital stock of $100,000. In January, 1903, its capital was increased to $300,000, and it had placed with the treasurer of the state of Wisconsin, pursuant to said statutes, securities aggregating $101,000.

In December, 1909, proper proceedings were had by said company to comply with the conditions of, and to thereafter do business under, the provisions of secs. 2024—77*i* to 2024—77*r*, Stats., being ch. 186, Laws 1909.

On October 2, 1913, the said securities being still in the possession of the state treasurer, the then banking commissioner of the state took possession of said Citizens Saving & Trust Company, finding it to be insolvent, and from then on he and his successor, *Marshall Cousins,* the present commissioner, proceeded to remain in charge and possession for the purpose of winding up its affairs and liquidating its business, under sec. 2022, Stats.

Claims of different classes or kinds, dependent upon the nature of the obligations of the several creditors, have been filed and allowed against the said Citizens Savings & Trust Company in such liquidation proceedings in the circuit court for Milwaukee county to an amount aggregating over $480,000.

On December 8, 1919, an order was made by said circuit court, determining and adjudging upon many of such claims and further providing, being the part of said order material here, that *Henry Johnson,* the treasurer of the state of Wisconsin, be authorized and directed to pay to *Marshall Cousins,* commissioner of banking, the sum of $33,590.10 out of the securities held by him as aforesaid, to be used by said commissioner of banking in paying a dividend to certain of the claimants whose claims were in said order determined and allowed.

It is a conceded fact that no proceedings had been taken

for a voluntary dissolution of the said corporation under sec. 1789, Stats., nor has it been dissolved by any action brought by the attorney general or by any person, he refusing to act, under secs. 3240, 3241, or 3242, and that there has been no formal dissolution of the corporation.

From the order so directing *Henry Johnson,* state treasurer, to pay for the purpose aforesaid the said sum of money, he has appealed.

For the appellant there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

For the respondent *Cousins* there was a brief by *Flanders, Fawsett & Smart,* and oral argument by *C. E. Monroe,* all of Milwaukee.

Briefs were also filed by *Lines, Spooner & Quarles* of Milwaukee, attorneys for *George H. Wright* and the *First Wisconsin Trust Company* as trustees, and by *Glicksman, Gold & Corrigan* of Milwaukee, attorneys for *Jacob Kaufer* and *Mary Mendel* as trustees; and the cause was argued orally by *George Lines.*

Henry E. Foelske of Milwaukee, attorney for *Albertina Johnson* and others.

ESCHWEILER, J. The state treasurer by this appeal very properly presents for final determination the question as to whether he may lawfully and safely proceed to disburse, pursuant to the order of the court below, a substantial sum of money out of the trust fund or securities theretofore deposited with him pursuant to the statutes by the Citizens Savings & Trust Company, the corporate existence of such trust company not yet having been formally terminated.

The deposit was made and has since been held pursuant to statutes which at the time of the deposit provided, and now provide in substance, that it should be held by the state treasurer in trust as security for the faithful execution of any trust which may be lawfully imposed upon and accepted

by such trust corporation; the statute further providing, in language the construction of which by the lower court is challenged on this appeal, as follows: that the securities or cash making up such deposit "shall, at all times, *during the existence of such corporation* remain in the possession of the state treasurer for the purpose aforesaid *and until otherwise ordered by a court of competent jurisdiction.*" Sec. 2024—77*j*.

The order involved here was made by a court of competent jurisdiction in liquidation proceedings commenced and carried on since October, 1913, under the provisions of sec. 2022, Stats. This statute gives a method for the complete control by the banking commissioner of all the assets of such an insolvent trust company and provides for the full and final distribution thereof to the creditors or the stockholders, as shall be directed by the circuit court having jurisdiction. It cannot need any mere formal dissolution of the corporation by separate proceedings before proper distribution of these securities to those determined to be entitled thereto can be made and ordered, as was here done, by the circuit court having jurisdiction of these proceedings. These necessarily result in a very practical dissolution of the corporation, so far at least as to its capacity to hold on any longer to what it had either in its own possession or that of the state treasurer.

This order is necessary and proper in carrying out the liquidation proceeding and is ample warrant for the state treasurer in complying with it.

The case of *State ex rel. Sheldon v. Dahl,* 150 Wis. 73, 135 N. W. 474, cited by appellant, in no wise conflicts with what is here determined, the situation and questions involved there being substantially different from those here.

A Mrs. Johnson has filed a brief in this matter, alleging her position to be that of one who had a sum on deposit with the Citizens Savings & Trust Company prior to December, 1909, when, as stated above, that company took the

proper steps to come under the provisions of the law as amended by ch. 186, Laws 1909. She claims that the order here before us fails to make proper provision for her rights as they were at that time as to such deposit. The record before us in this appeal, however, is not such that it can bring up for consideration the questions she suggests and for that reason we must decline to consider or pass upon them. Treating her request to be heard as in the nature of a petition to intervene herein, it must be denied.

By the Court.—Order affirmed.

KNAPP, Plaintiff in error, vs. THE STATE, Defendant in error.

February 14—March 9, 1920.

Bastardy: Evidence: Sufficiency.

In a bastardy proceeding, the evidence is *held* to support a conviction.

ERROR to review a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

For the plaintiff in error there was a brief by *Ryan & Cary* of Appleton, and oral argument by *Thomas H. Ryan.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

PER CURIAM. Plaintiff in error was convicted of bastardy and sued out a writ of error. His sole contention is that the judgment is not supported by the evidence. An examination of the record satisfies us that the judgment is supported by the evidence and should not be disturbed.

Judgment affirmed.

HAMILTON, Plaintiff in error, vs. THE STATE, Defendant in error.

February 14—March 9, 1920.

Criminal law: Homicide: Evidence: Reports of proceedings on a conviction of felony in another state: Proof of conviction of felony: Hearsay: Proof of identity: New trial: Newly discovered evidence: Reversal.

1. In a prosecution for murder it was improper to introduce in evidence the decision of the supreme court of another state discharging defendant from imprisonment on a conviction of felony in such state, where the conviction referred to was admitted by defendant on the trial, a former conviction being competent evidence only under sec. 4073, Stats., as affecting credibility, and provable only by cross-examination of the defendant or by the record.
2. Where the identification of the accused as the person seen leaving the place of the homicide was in issue, statements of police officers as to what a witness had said relative to the identity of the accused are hearsay and incompetent.
3. Where there is no direct evidence that the defendant committed the crime, except the identification of him as the person seen leaving the place of the homicide, made by a fourteen-year-old boy who is not positive in his testimony, the fact that the defendant made false statements in reference to his residence, his movements on the night of the crime, and other details, and that a fellow prisoner in the jail in which he was held awaiting trial testified that he overheard the defendant admit the crime while at prayer, does not justify a conviction beyond all reasonable doubt.
4. In this case, where the evidence as to the identity of the person who committed the crime is unsatisfactory and it is alleged that there is newly discovered evidence on this issue which is important, and the supreme court under sec. 2405*m*, Stats., cannot say that all the evidence was before the jury and that upon the record justice has been done, a new trial will be ordered.
5. A person convicted of crime has a right to demand the solemn judgment of the supreme court as well as that of the trial court as to whether his guilt was sufficiently proved.

ERROR to review a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

The plaintiff in error was charged in the information

with murder in the first degree of Edward Warner, at Racine, Wisconsin, on December 15, 1917. There were no actual eye-witnesses to the murder, which took place about 7:15 p. m. in a Standard Oil filling station at the intersection of Seventh and Main streets in the city of Racine. A fourteen-year-old boy named Mervil Peil, who was on the sidewalk of the street opposite the oil station, saw the murderer as he ran from the oil station to the sidewalk in front of the station, then north until he disappeared. The boy picked out *Hamilton* as "the man who resembled him most" from about a half dozen other men at the police station that evening. The identification was not positive, the boy asserting that "his (*Hamilton's*) height was about the same, and his dress, and the build of the man." The boy also stated that he could see how the man was dressed: "He had a short knee coat on, and a flat top cap with rounded sides, and he had his coat collar turned up and his ear-laps down."

The state also introduced testimony at the trial to show that a fellow prisoner of *Hamilton's* heard him praying at night in the jail and caught the words: "Oh, God, why did I kill this man? Oh, God, forgive me." It was also proved that *Hamilton* had at one time been known as Eli J. Long, and that he had been convicted in Michigan on July 2, 1908, of attempting to commit the crime of murder. *Hamilton* swears that on the evening of December 15, 1917, he left his home and rode on a jitney bus to the Racine Hotel; that he went directly from there to the postoffice; that while in the postoffice a boy crowded ahead of him in the line and told the postmaster of the firing of two shots at the filling station and another as the man came out. The boy was identified as Mervil Peil by defendant, and *Hamilton* claims that he first heard of the shooting from the conversation between this boy and the man at the postoffice window.

The case was submitted to the jury. The jury returned a verdict of guilty. On April 26, 1918, a motion for arrest of judgment and for a new trial was made upon affidavits

of defendant and his attorney to the effect that counsel had not learned until after the trial of the facts that the turnkey at the jail where defendant was confined, and two inmates, had personal knowledge that defendant's cell door was closed on the night when the witness Larsen testified that it was open and that he heard the declarations of the defendant while praying. The court overruled this motion for want of a proper showing of diligence. On May 3, 1919, a motion was presented to the trial court in defendant's behalf for a new trial upon the grounds of newly discovered evidence and that upon the whole record the evidence was not sufficient to sustain a conviction and imprisonment of defendant. The alleged newly discovered evidence is to the effect that Gertrude Gressing, aged twenty years, and Marion Gressing, an older sister, were at the time of the shooting at the oil station walking north on the opposite side from the station on East Main street; that immediately after the shooting they saw a man come out of the oil station and walk westerly; that they observed him and the garments he wore; that on the same evening about 10 o'clock, at the request of the police, they took the same position on the street from where they had witnessed the man leave the oil station after the shooting, and watched a man accompanied by the police walk from the oil station in the same direction they had seen the man go immediately after the shooting; that in their opinion the man accompanied by the police was not the man they saw immediately after the shooting. The man "accompanied by the police" was *Hamilton,* the defendant.

Defendant's counsel, Ahrens, states that he did not know of this evidence until April 5, 1919. It appears that the Racine newspapers referred to and published the fact that the Gressing sisters heard the shooting and saw the man as related above, and that the public generally heard of this fact and generally discussed it. The trial court held that the facts and circumstances disclosed by the affidavits in

support of the motion and the facts disclosed on the trial did not show due diligence and that, if this alleged newly discovered evidence were produced and submitted to the jury in connection with the evidence in the record, there is no reasonable probability that a different verdict would result; also that the court was of the opinion that justice had been done in the case. The motion was denied.

The plaintiff in error, herein called the defendant, urges that the court erred in (1) permitting the state to introduce in evidence the case published in 154 N. W. 567, concerning defendant's discharge by a decision of the supreme court of Michigan from a conviction on a charge of felony, the defendant having admitted this in open court; (2) receiving hearsay evidence of two police officers in testifying to the description Mervin Peil gave them at the police station, after seeing defendant and others in the station, as the man whose appearance and clothing looked like those of the man he had seen come out of the oil house immediately after the shooting; (3) refusing to grant a new trial on the grounds of newly discovered evidence. The defendant also urges that justice has not been done in adjudging him guilty, because the evidence in the case does not support the conviction.

Wallace Ingalls of Racine, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

SIEBECKER, J. The introduction of the case as printed in vol. 154 N. W. Rep., pertaining to the decision of the supreme court of Michigan discharging the defendant from imprisonment for a conviction of a felony, was improper, since such conviction was admitted on the trial. His former conviction is competent evidence only under sec. 4073, Stats., and such conviction can only be proven by his own cross-examination or by the record. It being admitted on the

record that he had been convicted and discharged on *habeas corpus* proceedings, it is readily perceived how the printed case of the proceeding in the Michigan supreme court might be the source of prejudicial inference where the identity of the person who did the shooting at the oil house was the grave and important issue on trial.

It is urged that the court erred in receiving the testimony of officers Yanne and Harms, who testified to a description Mervil Peil gave them of the man he saw leaving the oil house. True, this evidence was not objected to, but it is proper to be considered in connection with the other evidence in the case on the question raised whether or not the competent evidence in the case sustains the conviction beyond a reasonable doubt.

The all-important inquiry for determination by the jury was the fact of identifying *Hamilton* as the man who came out of the oil house immediately after the shooting. On this point the record rests on the evidence of the boy Mervil Peil. The evidence of these officers is but a repetition of what Peil stated to them. This kind of evidence has been held to be hearsay and incompetent. *O'Toole v. State,* 105 Wis. 18, 80 N. W. 915; *Gillotti v. State,* 135 Wis. 634, 116 N. W. 252.

Under the circumstances of the case it is most likely that it was given much weight by the jury to corroborate the testimony of Peil. A study of the testimony of Mervil Peil discloses that he at no time expressed a positive conviction that the defendant is the man he saw coming out of the oil house immediately after he heard the shooting. He gave the following description of his appearance by which to identify him: "I could see how he was dressed; he had a short knee coat on, and flat-topped cap with rounded sides, and he had his coat collar turned up and his ear-laps down." He states that he could not see the man below the knees because of a snow bank about two feet high. After viewing the man in this manner the boy started hurriedly to re-

port the occurrence to the police without another view of the man at that time. Later in the evening, after the defendant had been arrested and was exhibited to Peil with a number of other men at the police station, Peil states he was asked by the police, referring to the men before him, "What man he saw running away from the filling station?" On the trial he was asked the question, "How was the defendant dressed that night at the police station?" Answer: "Well, he had a coat on, a cap with rounded sides, a flat-topped cap, and he had also khaki pants and leggings on—and overcoat up about to his knees." In answer to a question if he saw any one at the police station "dressed similar to the man" whom he saw leaving the oil house he answered: "Well, *Mr. Hamilton* was the only man that looked something like him. He was the only man that was dressed mostly like him that left the filling station." This is as near as Peil could identify the man he saw coming from the oil house at the time and occasion. The testimony of the witness Larsen, who was confined to the jail and occupied a cell opening on the same aisle as did defendant's cell, is that the cells were left open one night in March and that about midnight, while he walked in the aisle, he heard defendant praying for about ten minutes or so in indistinct speech and understood defendant to say "Oh, God, why did I kill this man? Oh, God, forgive me;" that he did not see the defendant at the time he heard the words, nor could he tell whether or not he was asleep. All the other evidence in the case consists of circumstances surrounding the shooting, facts and incidents of the defendant's life, his whereabouts on the evening of the murder, his conduct when arrested and when subject to identification by the police on the same evening. The state, in addition to the foregoing testimony, lays stress on the impeachment of defendant's testimony by his former conviction and many contradictions on the witness stand. The state also urges that the following facts elicited on the trial showing falsification by defendant tend to prove that

Hamilton was the man who committed the murder: that he gave his name when arrested as Eli J. Long, when in fact he lived in Racine under the name of *George E. Hamilton;* that he testified at length that his real name is Eli J. Long and that he changed it to *Hamilton,* but that in 1917 he again changed it to Long; that he falsified as to how he traveled in going from his residence to the postoffice on the evening in question; as to the places he had resided in Racine before this evening; as to the treatment of him by police officers after his arrest and before being released on the evening of the shooting; about carrying money in his sock on the evening of the shooting.

We have searched the evidence and there is no evidence of direct proof that defendant is the man who fired the shots that killed Warner, except the testimony of Peil as above stated. True, the evidence pointed out by the state as tending to show that defendant made false statements in the respects referred to may have been considered by the jury as tending to indicate guilt, but even in this view of the case it is not sufficient, in connection with Peil's and Larsen's testimony, to remove from our minds the impression that it lacks convincing power, and has not the probative weight to justify defendant's conviction beyond all reasonable doubt. Furthermore, the testimony of the Gressing sisters as exhibited by the affidavit on the motion for a new trial for newly discovered evidence is important in view of the unsatisfactory state of the evidence on the subject of defendant's identification. Under the broad powers conferred on this court by sec. 2405*m,* Stats., we find it impossible to say that the evidence on the main controversy was all before the jury and that upon the record before us we are satisfied that justice has been done by the conviction of the defendant.

As declared in *Gerke v. State,* 151 Wis. 495, 139 N. W. 404, a person convicted of a crime has the right to demand the solemn judgment of this court as well as that of the trial

court as to whether his guilt was sufficiently proven. See, also, *Lonergan v. State,* 111 Wis. 453, 87 N. W. 455; *Koscak v. State,* 160 Wis. 255, 152 N. W. 181; *Kuhl v. State,* 167 Wis. 495, 167 N. W. 743.

By the Court.—The judgment of the circuit court is reversed, and the action remanded for a new trial. The warden of the state prison will deliver the plaintiff in error into the custody of the sheriff of Racine county, who will hold him in custody to await the further order of the court.

TRUSTEES OF ARMENIA LODGE No. 97, I. O. O. F., Respondent, vs. UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant: SAFIR, interpleaded, Respondent.

January 15—April 6, 1920.

Principal and surety: Evidence: Time of defalcation: Allegations in information to which defaulter pleaded guilty.

In an action on a fidelity bond to recover a loss sustained by the defalcation of one of plaintiff's trustees, the time of defalcation alleged in an information charging embezzlement, to which the trustee pleaded guilty, controlled as to the time of the defalcation, in the absence of other specific evidence thereof.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action begun in the civil court against the *United States Fidelity & Guaranty Company* on a fidelity bond to recover loss sustained by plaintiff by the defalcation of one of its trustees, Mahler. The defendant company caused one of Mahler's co-trustees, *Safir,* to be interpleaded, claiming that if judgment went against it *Safir* would be liable over to it on account of his negligence. At the close of the testimony all parties moved for a directed verdict. The court discharged the jury, made findings of fact to the effect that the defalcation took place during the life of the bond; that

Safir was not guilty of negligence, and judgment was entered against the *United States Fidelity & Guaranty Company* in favor of plaintiff for $800, the amount of the bond, and costs, and in favor of *Safir* for costs. The defendant appealed to the circuit court, where the judgment was affirmed, and thereupon it appealed to this court.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Emmet Horan, Jr.*, of counsel, all of Milwaukee, and oral argument by *Mr. Horan.*

Morris Stern of Milwaukee, for the respondent *Trustees of Armenia Lodge.*

Louis L. Cohen of Milwaukee, for the respondent *Safir.*

The following opinion was filed February 10, 1920:

VINJE, J. Only questions of fact are presented by this appeal. It is claimed (a) that there is no proof that the defalcation took place during the life of the bond, and (b) that *Safir* was guilty of negligence as a co-trustee. The bond was issued June 7, 1915, and renewed annually up to the time of the trial. Mahler pleaded guilty to an information charging embezzlement of the funds January 3, 1917, and upon examination in court when such plea was made he testified that the bonds were converted January 3, 1917. The record of this plea and examination was received in evidence without objection. In the absence of other specific evidence as to the time of defalcation the time alleged in the information controls. The trial court therefore properly found that the embezzlement took place during the life of the bond.

The trial court also found that *Safir* was not guilty of negligence; that he was elected trustee May 17, 1916, and served only for a few months. Both of these findings are sustained by the evidence. It appears that in the summer of 1916 he was elected Noble Grand. As such he was not a member of the board of trustees and he never was reelected a trustee so far as the proof shows. Since he was

not a trustee at the time of the defalcation he could breach no trust duty in respect thereto.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on April 6, 1920.

PADDEN, Appellant, vs. PADDEN and another, Respondents.

March 9—April 6, 1920.

Deeds: Deposit with third person for record and delivery after grantor's death: Intention of grantor.

1. In an action to set aside a deed, the fact that the grantor, after signing the deed, handed it to a third person with instructions to keep it and not record it or deliver it to the grantee until after the grantor's death, is *held* not to show delivery of the deed with an intention of parting with title and control of the lands.
2. Without an intention to transfer title, none passes by the mere execution of a deed and handing it to a third person to be held subject to the control of the grantor.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Action to set aside a deed from *Michael Padden* to *John J. Padden* of forty acres of land claimed previously to have been conveyed by *Michael Padden* to the plaintiff, and for the quieting of plaintiff's title as against any claim of *John J. Padden.*

Michael Padden is the father of *John J. Padden, James Padden,* and of the plaintiff. On or about November 15, 1916, he was the owner of eighty acres of land. He executed a deed to forty acres thereof, naming plaintiff as grantee, and a deed to the other forty acres, naming *James Padden* as grantee. The deeds were drawn by one Hughes, who had from time to time transacted some business for the

grantor, and they were handed to and kept by him. The trial court found that

"at the time the deed was so handed to said Hughes it was understood between said *Michael Padden* and said Hughes, according to instructions then given by said grantor, that said Hughes should keep said deed subject to further order of said grantor and that said Hughes should not record said deed, but that in case said grantor should give no further directions in regard thereto in his lifetime, then the said Hughes should deliver the same to the plaintiff after the death of said grantor, *Michael Padden.* That at the time of the execution of said deed and the delivery thereof to said Hughes as aforesaid, the said grantor, *Michael Padden,* had no intention of presently transferring the title in said premises to the plaintiff, but that his intention at the time was that such deed should operate as a testamentary document only, and should have no effect during his lifetime. That there was no consideration for the execution of said deed except natural love and affection between grantor and grantee therein as father and son."

A like finding was made in the case of *James Padden. Henry* and *James Padden* had used and occupied as pasture their respective forty-acre tracts for many years prior to the execution of the deeds to them, and *Henry Padden* had made improvements in the way of fencing and digging a well on his forty.

On August 20, 1918, *Michael Padden,* for a consideration of $1,500, executed and delivered a warranty deed of the said eighty acres to the defendant *John J. Padden* with the intention of conveying title thereto to him. As an additional consideration *John J. Padden* agreed to pay *Henry Padden* for the improvements he had made on the forty acres occupied by him, which the court found were of the value of $600.

The court held that the deed to plaintiff conveyed no title to him because never delivered with intent to do so; that title was in *John J. Padden* subject to a lien of $600 in favor

of *Henry Padden* for improvements made on the land. From a judgment entered accordingly plaintiff appealed.

For the appellant there was a brief by *Varnum & Kirk* of Hudson, and oral argument by *W. R. Kirk* and *N. O. Varnum.*

For the respondents there was a brief by *McNally & Doar* of New Richmond, and oral argument by *W. T. Doar.*

VINJE, J. The appeal presents a question of fact only: Did *Michael Padden* deliver the deeds to Hughes with the intention of parting with all control over them and with the title to the land? On this subject he testifies that he gave the deeds to Hughes with instructions to keep them with other papers he held for him; that the land was his as long as he lived, and that the deeds should not be recorded in his lifetime; that later on he withdrew the deeds from Hughes and deeded the land to *John J. Padden* for a cash consideration of $1,500 and an agreement on the part of the grantee to pay *Henry Padden* for his improvements. Hughes' testimony is to the same effect, and in addition he testified that when the deeds were executed *Michael* said he had given away so much of his property that he was not going to give away any more, and cautioned him three or four times not to record them. There is also testimony that the grantees sought to have Hughes record the deeds, but that he refused. There is no evidence to contradict the statements of *Michael Padden* and Hughes except such inferences as may be drawn from the fact that the deeds were executed and left with Hughes and the fact that the grantees continued to use the lands till they were deeded to *John J. Padden,* and some statements made by the grantor that the grantees would eventually get the lands. In this state of the record the findings of the trial court must be sustained because they conform to the clear preponderance of the evidence. Without an intention to transfer title, none passes by the mere execution of a deed and delivery thereof

to a third party to be held subject to the control of the grantor. *Prutsman v. Baker,* 30 Wis. 644; *Butts v. Richards,* 152 Wis. 318, 140 N. W. 1.

By the Court.—Judgment affirmed.

PADDEN, Appellant, vs. PADDEN and another, Respondents.

March 9—April 6, 1920.

Padden v. Padden, ante, p. 212, followed.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Varnum & Kirk* of Hudson, and oral argument by *W. R. Kirk* and *N. O. Varnum.*

For the respondents there was a brief by *McNally & Doar* of New-Richmond, and oral argument by *W. T. Doar.*

VINJE, J. This case is ruled by the case of *Padden v. Padden, ante,* p. 212, 177 N. W. 22.

By the Court.—Judgment affirmed.

WILL OF BAIRD: SCRUTON, Appellant, vs. WIGER, Administrator, and another, Respondents.

March 9—April 6, 1920.

Wills: Construction: Devise to wife during widowhood: Estate conveyed.

A clause in a will devising lands to testator's wife "so long as she remains my widow" is construed to convey a fee subject to be divested upon the remarriage of the widow; sec. 2278, Stats. (declaring that every devise of land shall be construed to convey all the estate of the devisor therein unless it shall clearly appear by the will that a less estate was intended), giving to the devise the same effect as if words of inheritance had been used.

APPEAL from a judgment of the circuit court for Pierce county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Construction of will. Robert Baird died testate on the

11th day of October, 1890. His will was probated. By its terms it provided in clause 2:

"I give and devise to my wife, Elizabeth, so long as she shall remain my widow, the west half of the northwest quarter of section two (2), town twenty-six (26), range eighteen (18), Pierce county, Wisconsin.

"3d. All the rest and residue of my real estate I give and devise to my daughters Annie, *Agnes,* and Margaret, and my grandson, R. J. Dale, share and share alike.

"4th. I give and forgive my son *William* what he owes me and nothing more."

The other clauses of the will are not material.

Baird left surviving him his widow, Elizabeth Baird, his daughters *Agnes,* the plaintiff, Margaret, and Annie, his son *William,* and R. J. Dale, his grandson, being a son of a deceased daughter. He left two eighty-acre tracts of land in Pierce county at the time of his death, valued at about $4,000, and personal property of the value of $1,100. Prior to the making of his will he had given his son, *William Baird,* about $1,100, and had sold *William* a team for $250, for which *William* had given him a note, which remained unpaid. His will was executed on the 25th day of June, 1889. The widow, Elizabeth, never remarried, and died January 31, 1919.

On the theory that the interest of the widow was a life estate, R. J. Dale deeded to Margaret Maier, and she in turn deeded her interest in the property to William H. Scruton. It appears that Robert Baird, the testator, was a man of Scotch ancestry, devoted to his family, read newspapers, took an interest in educational matters, and kept posted on general affairs, but did not read books.

The trial court held that by clause 2 the wife, Elizabeth, took title in fee simple to the said west half of the northwest quarter of section 2, subject only to be divested by her remarriage. Judgment went accordingly, from which *Agnes Scruton* appeals.

For the appellant there was a brief by *John E. Foley* of

Ellsworth and *Varnum & Kirk* of Hudson, and oral argument by *N. O. Varnum.*

F. M. White of River Falls, for the respondents.

ROSENBERRY, J. The respondents rely mainly on *Will of Weymouth,* 165 Wis. 455, 161 N. W. 373; *Will of Brooks,* 167 Wis. 75, 166 N. W. 775; *Rissman v. Wierth,* 220 Ill. 181, 77 N. E. 108; *Verrinder v. Winter,* 98 Wis. 287, 73 N. W. 1007; *Polebitzke v. John Week L. Co.* 157 Wis. 377, 147 N. W. 703; *Dicke v. Wagner,* 95 Wis. 260, 70 N. W. 159; *Horner v. C., M. & St. P. R. Co.* 38 Wis. 165; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 120 N. W. 277, to sustain the judgment of the trial court, the theory of the respondents being that the words "I give and devise to my wife, Elizabeth," constitute an absolute devise in fee simple of the real estate in question to Elizabeth Baird, and the words "so long as she shall remain my widow" create a condition subsequent, upon the happening of which the fee-simple title is divested, and cite the following cases from other jurisdictions in support of this construction: *Little v. Giles,* 25 Neb. 313, 327, 41 N. W. 186; *Roberts v. Lewis,* 153 U. S. 367, 14 Sup. Ct. 945; *Weir v. Michigan S. Co.* 44 Mich. 506, 7 N. W. 78; *Davis v. Ripley,* 194 Ill. 399, 62 N. E. 852; *Crain v. Wright,* 114 N. Y. 307, 21 N. E. 401; *Becker v. Becker,* 206 Ill. 53, 69 N. E. 49; *Cummings v. Lohr,* 246 Ill. 577, 92 N. E. 970; *Rissman v. Wierth,* 220 Ill. 181, 77 N. E. 108; *Bennett v. Packer,* 70 Conn. 357, 39 Atl. 739; *Becker v. Roth,* 132 Ky. 429, 115 S. W. 761; *Wilson v. Linder,* 18 Idaho, 438, 110 Pac. 274, 138 Am. St. Rep. 213.

The contention of appellant is that the clause in question at most conveys a life estate, subject to be sooner terminated by the remarriage of the widow; that the words "so long as" in the phrase "so long as she shall remain my widow" are words of duration.

The clause under consideration contains no words of inheritance, and prior to the adoption of sec. 2278, Stats., would have created in the devisee a life estate. Sec. 2278 reads:

"Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."

In construing this section it was said in *Dew v. Kuehn,* 64 Wis. 293, 25 N. W. 212:

"Under the common-law rule the presumption was that only a life estate was intended to be conveyed, unless words of inheritance were used, or other words showing an intent to devise a greater estate. This act was not intended in any other respect to restrict the power of the court, in the construction of wills, by limiting the courts in all cases of devises of real estate to the words of the will alone in determining the extent of the estate devised, unaffected by the surrounding circumstances which may properly have force and be considered in construing the language used by the testator and thus determining the real intent of the testator by the use of such language."

The appellant cites *Fuller v. Wilbur,* 170 Mass. 506, 49 N. E. 916; *Ferrari v. Murray,* 152 Mass. 496, 25 N. E. 970; *Redding v. Rice,* 171 Pa. St. 301, 33 Atl. 330; *Staack v. Detterding,* 182 Iowa, 582, 161 N. W. 44; *Cowman v. Glos,* 255 Ill. 377, 99 N. E. 586; *Brunk v. Brunk,* 157 Iowa, 51, 137 N. W. 1065. See, also, note 28 L. R. A. N. S. 1093, and L. R. A. 1918C, at p. 861. The cases of *Giles v. Little,* 104 U. S. 291; *Little v. Giles,* 25 Neb. 313, 41 N. W. 186; and *Roberts v. Lewis,* 153 U. S. 367, 14 Sup. Ct. 945, all relating to the will of one Jacob Dawson, are also cited.

We shall not attempt an analysis of the various cases cited, nor make any attempt to reconcile them, for they are to some extent irreconcilable. We come back, therefore, to the fundamental proposition that this, as all other wills, must be so construed as to carry out the intention of the testa-

tor. Very little, if any, light is thrown upon the matter by the surrounding facts and circumstances. The property had been acquired by the joint efforts of husband and wife. She had the largest claim upon him. He no doubt recognized it, and framed his will accordingly. It can be logically argued that the words "so long as she remains my widow" are words of duration; that she could not remain a widow longer than during the term of her natural life; and therefore that she at most took a life estate. Treating the words "I give and devise to my wife" as equivalent to the words "I give and devise to my wife, Elizabeth, and her heirs," that is, as conveying, when used, without limitation an estate in fee simple, there is no language in the will that indicates any intent on the part of the testator to limit the gift except under one contingency, and that is the remarriage of his wife. Except for that, the estate is absolutely hers. While it is a difficult matter to be certain that the actual intent of the testator is arrived at, we are of the opinion that the trial court was correct in holding that the words were used to create a condition, and that the widow took an estate in fee simple subject to be divested only by her remarriage.

By the Court.—Judgment affirmed.

BIRD, Appellant, vs. BIRD, Respondent.

March 9—April 6, 1920.

Divorce: Cruel and inhuman treatment: Evidence: Wife's attention to others: Unfriendliness toward husband caused by his misconduct: Appeal: Finding not appealed from conclusive.

1. On an appeal by the wife alone from a judgment refusing both parties a divorce because both were guilty of cruel and inhuman treatment, the finding of the trial court as to the cruelty of the wife only is reviewable.
2. In order to constitute cruel and inhuman treatment the conduct of the guilty party must be such as to cause mental

suffering to the other and render impairment of health probable, so that the continuance of the marriage state would be dangerous. Whether certain conduct is cruel and inhuman depends on its effect on the offended spouse.

3. Evidence that the wife took automobile rides with a male roomer, played cards with him in his room, and upon one occasion wrote him an affectionate letter, is insufficient to show cruel and inhuman treatment of the husband by the wife, under the circumstances.
4. Nagging of the husband by the wife and her refusal to take meals with him or accompany him to public places, where such conduct was the natural result of the husband's confessed immoral conduct with other women, is not sufficient to furnish the husband grounds for divorce.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action for divorce. Both parties alleged cruel and inhuman treatment and prayed for affirmative relief. The court found "that defendant has been guilty of a course of cruel and inhuman treatment toward plaintiff, consisting of association with other women, some of whom were of lewd and immoral character; that he frequently told the plaintiff of his association with such women and informed her that he had had sexual intercourse with them." Also, "that plaintiff has been guilty of a course of cruel and inhuman treatment toward the defendant, consisting of nagging the defendant and refusing to take meals with him or accompany him to places in public, and of keeping a man roomer in their home contrary to the wishes and against the protests of the defendant, to which roomer the plaintiff wrote a sentimental letter, and in whose room she has passed considerable time playing cards and with whom she has taken automobile rides." Judgment was entered dismissing the plaintiff's complaint and defendant's counterclaim, from which judgment plaintiff appealed.

For the appellant there was a brief by *Gilbert & Ela* of Madison, and oral argument by *Frank L. Gilbert.*

Rufus B. Smith of Madison, for the respondent.

OWEN, J. The court having found both parties guilty of cruel and inhuman treatment, refused a divorce to either, upon the authority of *Hiecke v. Hiecke,* 163 Wis. 171, 157 N. W. 747, and cases there cited, where it is held that a divorce will not be granted to one spouse where he or she has been guilty of conduct also amounting to grounds for a divorce. Only the plaintiff appealed. The finding that defendant has been guilty of a course of cruel and inhuman treatment is therefore to be regarded as a verity. The question to be reviewed is whether the evidence supports the finding of the trial court that plaintiff has been guilty of a course of cruel and inhuman treatment towards the defendant.

According to the finding of the trial court, the conduct of the plaintiff which was held to constitute cruel and inhuman treatment consisted of "nagging the defendant and refusing to take meals with him or accompany him to places in public, and of keeping a man roomer in their home contrary to the wishes and against the protests of the defendant, to which roomer the plaintiff wrote a sentimental letter, and in whose room she has passed considerable time playing cards and with whom she has taken automobile rides." In order to constitute cruel and inhuman treatment the conduct of the guilty party must at least be such as to naturally cause great mental suffering to the other and render impairment of health probable, so that further efforts to perform the duties of the marriage state would be dangerous. *Hiecke v. Hiecke, supra.* Whether certain conduct is cruel and inhuman depends upon the effect it has upon the offended spouse. Conduct which will cause great anguish and suffering to a sensitive nature will be passed unnoticed by one of a crass disposition. The evidence which tends to establish cruel and inhuman treatment on the part of the plaintiff must be considered with reference to its effect upon the defendant. Her culpable conduct may be treated under two

heads: (a) her relations with a man roomer; and (b) her personal attitude towards the defendant.

Plaintiff and defendant lived in a house in the city of Madison which was owned by the plaintiff. Two or three of the rooms were rented to male roomers. Defendant claims that plaintiff was unduly familiar with one of these roomers, which familiarity consisted of taking some automobile rides with him, playing cards in his room, and, upon one occasion, writing him an affectionate letter. The evidence shows that the roomer owned an automobile, and that occasionally, with the full knowledge and apparent consent of the defendant, plaintiff went on automobile rides with him. We find no suggestion in the evidence that defendant ever objected to these automobile rides. It further appears that, occasionally, she went into his room and played cards with him. It appears that at all such times the door was open and they were in full view of any one passing along the hall. There is no suggestion in the evidence that the meetings in this room were clandestine, or that anything immoral ever occurred, or that they were ever in the room together with the door closed. Neither is there evidence that the defendant ever objected to this conduct. It is conceded that upon one occasion, when the roomer was out of town, the plaintiff wrote him a letter, affectionate in its terms, but to which no name was signed. This letter came into the hands of the defendant. He recognized the handwriting and called for an explanation, bringing both parties together. It was explained to him that the letter was a joke; that it was written in a spirit of foolishness and to lead the roomer to believe that it came from some unknown young lady. This explanation seems to have been accepted by the defendant, because the matter was never brought up again. The defendant, however, preserved the letter for future use, hiding it in the basement. It was brought forth to serve its purpose when the plaintiff brought a divorce action against him in 1915, after which it was

again laid away in a place of security, but, before the bringing of this action, had been destroyed by the defendant. The record is entirely barren of any suggestion that the defendant was humiliated or caused any grief, anguish, or suffering by reason of the relations existing between the plaintiff and this roomer. In fact, until the occasion hereinafter to be referred to, there was apparently the friendliest feelings between the defendant and this roomer. These relations were disturbed, however, by this circumstance: The plaintiff suspected the defendant of having illicit relations with a certain woman in the city of Madison. At the request of plaintiff this roomer followed the defendant one night and came upon him in the company of this woman. Defendant became very angry and demanded that he leave the house. Plaintiff, however, prevailed upon him to temporarily withdraw his objections to his remaining in the house because, as he states, the room rent was paid up for some time in advance. According to defendant's testimony, he consented to his remaining in the house until the expiration of the time to which the room rent was paid. He claims, however, that after that time the matter was referred to between him and plaintiff at intervals of from one to two months. This she denies. It is without dispute that there were occasional, if not frequent, altercations between plaintiff and defendant, and it seems quite clear to us that if this matter was brought up as defendant claims, it was in the nature of a counter-charge and by way of defense when his own misconduct was under criticism by the plaintiff.

It is not without significance that this action was commenced January 20, 1919, at which time this roomer had been absent in the service of the United States army for a period of six months. Defendant evidently did not feel sufficiently aggrieved at the presence of this roomer to prompt him to institute divorce proceedings, but remained quiescent until plaintiff brought this action, and then pleaded

the relations of plaintiff and this roomer as grounds for affirmative relief, when such relations had ceased for a period of six months. We are forced to the irresistible conclusion that these relations did not amount to cruel and inhuman treatment of the defendant.

We next come to consider the personal attitude of plaintiff towards the defendant. According to the finding of the trial court, this consisted of "nagging the defendant and refusing to take meals with him or accompany him to places in public." Having in mind the conduct of which the trial court convicted the defendant, it is not surprising that such conduct was the subject of frequent altercations between them. Such a state of affairs was the natural result of defendant's own wrongdoing. To say that her constant nagging, as the court terms it, furnishes the defendant grounds for a divorce, is to say that a wife cannot remonstrate, by word and action, against the confessedly immoral conduct of her husband without thereby subjecting herself to an action for divorce. We are not disposed to dignify such a proposition by extended consideration. Woman's nature is such that a wife will not submit in peace and silence to gross violations of marriage vows on the part of a husband.

By the Court.—Judgment reversed, and cause remanded with directions to grant the prayer of plaintiff's complaint.

CLARKE, Appellant, vs. MAISCH, Respondent.

March 9—April 6, 1920.

Auctions and auctioneers: Conditions of sale: Announcement by auctioneer: Effect: Vendor and purchaser: Agreement silent as to furnishing abstract: Custom.

1. The conditions of a public sale announced by the auctioneer at the beginning of the sale are binding on a purchaser, though, coming late, he did not hear the announcement and did not know thereof until after he had signed the memorandum of sale.
2. Announcement by the auctioneer that clear title would be conveyed and that an abstract of title of the lots was at the bank for the use of all purchasers if they desired to examine the title, implies that purchasers are not to be furnished abstracts with their deeds.
3. A vendor is not required to furnish the purchaser an abstract of title where the contract of sale is silent on the subject.
4. In this case, evidence of the custom of the vendor to furnish an abstract is inadmissible because the defendant, by reason of the auctioneer's announcement at the sale, purchased on the condition that no abstract would be furnished.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Plaintiff brought action for specific performance of a contract to convey land. He was the owner of several lots in the village of Middleton, Dane county, Wisconsin, and on October 13, 1916, held an auction of the lots at the village of Middleton. The lots in question were struck off to *Gottlieb Maisch,* the defendant, upon his bid of $225. Immediately after being so sold, a written memorandum of the sale and purchase of the lots was executed. The memorandum is silent as to abstract. Defendant demanded that a separate abstract of title of the lots be furnished him by the plaintiff with the deed. The plaintiff refused to provide the abstract. Defendant then left a check for $225 with the Bank of Middleton to be turned over to plaintiff upon receipt from plaintiff of a deed and abstract. Plaintiff left a deed with the bank for defendant upon payment.

A trial of the issue was had before the court without a jury on May 19, 1919. The cause was reopened on July 5, 1919, for the purpose of taking evidence of a general custom obtaining in Madison and vicinity as to who should furnish the abstract when the contract of sale is silent on the subject.

The court found that the defendant purchased two lots of the plaintiff by written contract which was silent as to the furnishing of an abstract of title; that it was the general custom, when real estate was purchased by written contract which was silent as to the furnishing of an abstract, for the vendor to furnish it; and that such abstract is the property of the vendee. The court also found that such custom had existed for such length of time and existed so generally as to raise a presumption that the parties had knowledge of it and entered into the contract with reference to it, and that the defendant had no knowledge that the sale here in question was made upon any condition as to abstract other than that fixed by such general custom.

Judgment was entered directing defendant to pay the purchase price, without interest, on the condition that plaintiff first pay the defendant's costs and disbursements in this action, and that plaintiff also furnish the defendant an abstract of the title to the lots. This is an appeal from such judgment.

James H. Feeney of Madison, for the appellant.

For the respondent there was a brief by *Tenney, Tenney & Reynolds* of Madison, and oral argument by *E. J. Reynolds.*

SIEBECKER, J. It appears that the lots in question were sold to the defendant at an auction. The defendant fully understood the method of conducting this sale and participated in the bidding for the purchase of the two lots included in the memorandum of sale executed by the parties at the time the auctioneer struck them off to him as the

highest bidder. It appears that the auctioneer announced when the sale began that a deed conveying a good and clear title would be given to the purchasers and that an abstract of title of the lots sold was at the Bank of Middleton for the use of all the purchasers if they desired to examine the record title to the lots. *Mr. Maisch* was not present to hear this announcement, nor was this information communicated to him before he purchased the lots and signed the memorandum of sale. It is a rule of law that the conditions of a public sale announced by the auctioneer are binding upon a purchaser, whether he knew them or not. *Keske v. Boeder,* 168 Wis. 369, 170 N. W. 247; *Kennell v. Boyer,* 144 Iowa, 303, 122 N. W. 941; 6 Corp. Jur. p. 828, § 20, cases, note 70.

The evidence is clear that the defendant was a bidder for the lots at an auction sale, that they were struck off to him, and that it had been announced that the abstract at the bank was to be furnished for the use of all the purchasers. The clear implication of this announcement is that no other abstract was to be furnished by the vendor and that the vendor of the lots was not to furnish the vendees an abstract of title with the deed. Under these facts and circumstances the memorandum of sale is subject to this condition concerning an abstract, and the plaintiff has the right to stand on it as one of the terms of the sale in addition to those embodied in the written memorandum. It is well established by the adjudications that a vendor is not required by law to furnish the vendee of land an abstract when the contract of sale is silent on the subject.

"In the United States an abstract is not an implied feature of every sale of land. Since every title is of record, the doctrine of *caveat emptor,* in the absence of special agreement, requires the purchaser to satisfy himself as to title, and for that purpose to make the necessary investigation and abstracts." *Thompson v. Robinson,* 65 W. Va. 506, 64 S. E. 718; *McQuary v. Missouri L. Co.* 230 Mo. 342, 130 S. W. 335; *Easton v. Montgomery,* 90 Cal. 307,

27 Pac. 280; *State v. Grimes,* 29 Nev. 50, 84 Pac. 1061; *Tapp v. Nock,* 89 Ky. 414, 12 S. W. 713; *Espy v. Anderson,* 14 Pa. St. 308; *Turn Verein Eiche v. Kionka,* 255 Ill. 392, 99 N. E. 684, 43 L. R. A. N. S. 44 and note.

It necessarily follows that the trial court erred in receiving evidence of custom on the subject of the obligation of a vendor to furnish the vendee an abstract of title, since by the contract of sale, as above shown, the defendant made this purchase upon the condition that no abstract would be furnished him as purchaser, but that he in common with all purchasers of lots could examine plaintiff's abstract at the bank. Proof of custom was incompetent. Evidence of custom and usage is only permissible to add tacitly implied incidents to a contract, "to define what is ambiguous or is left indeterminate in a contract, where both parties have knowledge of the custom, or are so situated that such knowledge may be presumed." *Gehl v. Milwaukee P. Co.* 105 Wis. 573, 81 N. W. 666; *Lamb v. Klaus,* 30 Wis. 94.

The plaintiff is entitled to recover on the cause of action alleged in the complaint.

By the Court.—The judgment appealed from is reversed, and the cause remanded with direction to award judgment in plaintiff's favor, in accordance with this opinion.

HASWELL, Appellant, vs. REUTER, Respondent.

March 9—April 6, 1920.

Automobiles: Accident at street intersection: Law of the road: Contributory negligence: Excessive speed: Proximate cause: Question for jury: Master's liability for gross negligence of servant: Ratification: Trial: View of premises by jury: Purpose: Instructions: Harmless error: Special verdict: Amendment by court: Appeal: Grounds assigned immaterial if ruling proper.

1. In an action for damages because of a collision between two automobiles, a finding of the jury that plaintiff was guilty of contributory negligence is sustained by evidence showing

that he drove his car across a street intersection at the rate of about twenty miles an hour and speeded up somewhat to cross in front of the defendant, who had the right of way under sec. 1636—49, Stats.

2. To render an employer liable for the gross negligence of a servant in the course of his employment, it is not essential that there should be a ratification of such negligence on the part of the employer.
3. It is immaterial what ground is assigned by the trial court for its ruling if it be in fact correct.
4. Where the collision between the automobiles would not have occurred but for the excessive speed at which the plaintiff was driving, the plaintiff's negligence was the proximate cause of the collision, and the court properly changed the jury's answer to a question as to whether such negligence was the proximate cause from "No" to "Yes."
5. When the causal connection is clear it may be found by the court, but when not clear it is a question for the jury.
6. A view of the scene of the accident is taken for the purpose of enabling the jury to understand the evidence, and an instruction that the verdict must be based on the evidence and upon the view is error; but where there was nothing in the view which would enable the jury to determine which party was at fault, such error is not prejudicial.
7. A finding in a special verdict that plaintiff was guilty of a want of ordinary care is not inconsistent with a finding that he was not guilty of a want of ordinary care with reference to the manner in which he ran his automobile at and before the time of the collision, the former finding being general and being based on the driving of the automobile at excessive speed, and the latter relating only to the manner of driving the car other than with respect to speed.

APPEAL from a judgment of the superior court of Dane county: AUGUST C. HOPPMANN, Judge. *Affirmed.*

Action to recover damages to plaintiff's automobile sustained in a collision with defendant's truck at the intersection of Regent and South Park streets in the city of Madison, January 26, 1919. Plaintiff charges ordinary negligence in one count and gross negligence in another count of the complaint. The defendant answered and counterclaimed for damages to his truck, alleging separately both ordinary and gross negligence on the part of the plaintiff. At the close of the evidence the court granted defendant's

motion to dismiss plaintiff's cause of action founded upon gross negligence, and submitted the issues raised by plaintiff's cause of action charging ordinary negligence and the causes of action alleged in the counterclaim to the jury. Sanders was defendant's driver. The jury returned the following verdict:

"(1) Was Sanders guilty of any want of ordinary care with reference to the speed at which he ran the defendant's truck at and before the time of the collision? *A.* No.

"(2) If you answer question number 1 'Yes,' then answer this question: Was such want of ordinary care the proximate cause of the collision? *A.* ——.

"(3) Was plaintiff guilty of any want of ordinary care that contributed to the damage to his car and the injuries to himself? *A.* Yes.

"(4) What sum will measure the damage done to the plaintiff's automobile as a result of the collision? *A.* $590.11 (by the court).

"(5) What sum will measure the damages sustained by the plaintiff as personal injuries which he received as a result of the collision? *A.* None.

"(6) Was plaintiff guilty of gross negligence with reference to the speed at which he ran his automobile at and just before the time of the collision? *A.* No.

"(7) If you answer question 6 'No,' then answer these questions:

"(a) Was the plaintiff guilty of any want of ordinary care with reference to the speed at which he ran his automobile at and before the time of the collision? *A.* Yes (by the court).

"(b) Was such want of ordinary care with reference to the speed at which plaintiff ran his automobile, at and before the time of the collision, the proximate cause of defendant's damages? *A.* No.

"(c) Was plaintiff guilty of any want of ordinary care with reference to the manner in which he ran his automobile at and before the time of the collision? *A.* No.

"(e) If you answer question (c) 'Yes,' then answer this question: Was such want of ordinary care with reference to the manner in which plaintiff ran his automobile at and before the time of the collision the proximate cause of defendant's damages? *A.* ——.

"(f) Was Sanders guilty of any want of ordinary care that contributed to the damage to the defendant's truck? *A.* Yes.

"(8) What sum will measure the damage done to the defendant's truck as a result of the collision? *A.* $29.02 (by the court)."

The court changed the answer to question No. 7 (b) from "No" to "Yes," and upon the verdict so amended entered judgment dismissing plaintiff's complaint upon the merits and likewise defendant's counterclaim, with costs to the defendant. Plaintiff appealed.

For the appellant there was a brief by *Curkeet & Lewis* of Madison, and oral argument by *William R. Curkeet.*

For the respondent there was a brief by *Olin, Butler, Stebbins & Stroud,* and oral argument by *Byron H. Stebbins* and *Benj. H. Bull,* all of Madison.

VINJE, J. Did the court err in dismissing plaintiff's second cause of action based upon the alleged gross negligence of Sanders? It is true that the trial court gave as a reason for dismissing it that no ratification of Sanders's conduct was shown. While it is not essential in order to render a defendant liable that there should be a ratification on his part of gross negligence committed by his servant while in the course of his employment (*Craker v. C. & N. W. R. Co.* 36 Wis. 657, 668; *Schaefer v. Osterbrink,* 67 Wis. 495, 30 N. W. 922; *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424), still it is immaterial what ground the trial court assigned as the reason for his ruling if it be in fact correct. *Falkenstern v. Greenfield,* 145 Wis. 232, 130 N. W. 61; *Jeffers v. G. B. & W. R. Co.* 148 Wis. 315, 134 N. W. 900; *Garage E. M. Co. v. Danielson,* 156 Wis. 90, 144 N. W. 284. So the question remains, Was there any gross negligence on the part of Sanders? The ground is nearly level at the intersection of the two streets. Regent is paved with asphalt and is in fine

condition. South Park has a macadam pavement that is somewhat rough. The evidence shows that Sanders drove his truck, being a Ford car with a box for carrying milk, altogether weighing about 2,200 pounds, at a rate not exceeding from ten to fifteen miles per hour. Indeed, the preponderance of evidence is that his speed was less. The jury acquitted him of ordinary negligence as to speed, and properly so under the evidence. The gist of the allegations of gross negligence in the complaint is excessive, wanton, and reckless speed on the part of Sanders. Since there is a lack of evidence to show ordinary negligence in this respect, it follows as a matter of course that there is a failure to show gross negligence.

The jury found plaintiff guilty of contributory negligence. He was driving east on Regent street and defendant was driving north on South Park street; the latter therefore had the right of way under sec. 1636—49, Stats. There was no obstruction preventing either driver from seeing the other for a distance of at least 150 feet back from the crossing and continuously from there to the crossing. Plaintiff testified that he drove at a rate of about twenty miles an hour and that he presumed he speeded up some to get across. He drove a Buick sedan weighing with its passengers about 4,650 pounds. There is other evidence to sustain the finding that plaintiff drove at a great rate of speed considering the fact that he was about to intersect South Park street and that defendant was coming north on it and had the right of way. In view of the answers of the jury to questions 3 and 7 (a) it is clear that the negligence of plaintiff consisted in an excess of speed, while that of the defendant, as shown by the answers to questions 1 and 7 (f), did not consist in excessive speed, but in the manner in which he handled his truck at or just before the collision. At any rate it is clear that the jury negatived negligent speed on his part, and the only other evidence that would sustain a finding of negligence is the

manner in which he operated his truck when the collision was imminent. Since undisputed competent evidence shows plaintiff guilty of contributory negligence, a number of assigned errors become immaterial. We shall note only a few. That the collision occurred as the result of excessive speed on the part of plaintiff cannot well be doubted. He drove his car over the crossing just in front of the defendant, at a high rate of speed, when he should have yielded the right of way, and was struck by the truck before he cleared. In view of such undisputed fact, the court properly changed the answer to question 7 (b) from "No" to "Yes." It followed as a matter of law from the previous findings of the jury that plaintiff's negligent rate of speed was the proximate cause of the collision. But for such speed the collision would not have occurred. When the causal connection is clear it may be found by the court; when not clear it is a question for the jury. *Steinkrause v. Eckstein,* 170 Wis. 487, 175 N. W. 988.

The jury viewed the premises, and the court instructed them that the answer to each question of the special verdict "must be based wholly upon the view of the premises and the evidence which had been received during the trial." This was error. The finding must be based upon the evidence in the case and not upon facts disclosed by the view not in evidence. The view is taken for the purpose of enabling the jury to understand the evidence introduced and not for the purpose of furnishing original evidence upon which to base a verdict. *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328; *Munkwitz v. C., M. & St. P. R. Co.* 64 Wis. 403, 25 N. W. 438; *Seefeld v. C., M. & St. P. R. Co.* 67 Wis. 96, 29 N. W. 904; *Hughes v. C., St. P., M. & O. R. Co.* 126 Wis. 525, 106 N. W. 526. But the error was nonprejudicial. What the jury saw was the intersection of two nearly level paved streets. No defects in the streets or delicts of either party were visible. Nothing was seen upon which the jury could base a finding of

contributory negligence. That finding must have rested exclusively upon the evidence given upon the trial. The fact that the jury saw such a place of collision could not enable them to determine who was at fault. Therefore the erroneous instruction was harmless.

It is urged that the answers to questions 3 and 7 (c) are inconsistent. Question 3 is general, and, as before stated, the negligent speed of plaintiff required an affirmative answer. The court held so in answering question 7 (a) as to speed. Question 7 (c) relates to a negligent act arising from the manner in which the car was driven other than that of speed, and none was found—perfectly consistent with a finding of negligent speed.

Since the facts showed contributory negligence of plaintiff as to his cause of action and of defendant as to his cause of action, the court properly dismissed both complaint and counterclaim upon the merits.

By the Court.—Judgment affirmed.

McCHESNEY, Appellant, vs. DANE COUNTY, Respondent.

[Two cases.]

March 10—April 6, 1920.

Highways: Action against county for defective condition: Defects outside of traveled track: Contributory negligence: Traveler leaving prepared track: Question for jury.

1. The act of traveling for one's own convenience outside of a way prepared for the public constitutes contributory negligence as a matter of law.
2. Where a defect or obstruction within the limits of a highway is not in the traveled part of the road or so connected with it as to affect the safety and convenience of those using the traveled bed, the municipality is not responsible for an injury sustained by reason thereof.
3. In an action against a county for injuries sustained by an automobile driver by running into a culvert abutment in the road but not in the traveled part thereof, where the driver turned out of the traveled track to avoid an automobile ap-

proaching from the opposite direction, the question of whether the abutment was so connected with the highway as to affect the safety of the driver in his use of the traveled part of the highway is for the jury.

APPEAL from a judgment of the superior court of Dane county: AUGUST C. HOPPMANN, Judge. *Reversed.*

Personal injury. On July 5, 1916, the plaintiff purchased an automobile. He had never operated an automobile but had had considerable experience in the operation of traction engines. The seller undertook to teach the plaintiff how to drive the car. After driving around on the streets of Madison, the plaintiff, accompanied by the seller, started toward the home of the plaintiff at Dane, driving along the Westport-Madison road. Several miles before the place of the accident was reached the seller turned the operation of the car over to the plaintiff. It was a bright, clear day. Plaintiff succeeded in meeting several vehicles, and was driving at the rate of about ten or fifteen miles an hour, and at a point opposite Mendota station, when he overtook and passed a horse and buggy, turning out on his left, and then swung back into the road, which consisted of eight or ten feet of macadam or gravel with four or five feet of dirt on either side, with a grassy margin. As he regained the road he saw an automobile coming toward him at a rate of speed much greater than he was traveling. He then turned out into the grassy part of the highway, so that the right-hand wheels were in the grass about a foot, he being of the opinion that the oncoming car did not intend to yield a due part of the highway. While plaintiff was so driving to his right, watching the road and keeping a lookout for the approaching car, the right-hand front wheel of plaintiff's automobile struck a culvert abutment which was concealed by grass and weeds, thus incurring the injury complained of. The space between the culvert abutments was twenty feet. The traveled track lay eighteen inches nearer the abutment which the plaintiff struck than

the opposite abutment. The automobile was an ordinary car, having a tread of fifty-six inches, and being over all of the width of about six feet, perhaps two or three inches less.

At the close of the plaintiff's testimony the trial court granted defendant's motion for a nonsuit, on the ground that the plaintiff had departed from the traveled track for his own convenience and was therefore guilty of contributory negligence. The court said:

"By the act of going clean out of the highway he invited the oncoming automobile to all of the road, so to speak. If he had stayed in the highway and just gave one half of the highway, as he had a right to do, the oncoming automobile would no doubt have gone to its side and given him a clear space to cross that culvert."

From judgment in favor of defendant the plaintiff appeals.

For the appellant there was a brief by *Crownhart & Wylie* of Madison, and oral argument by *Fred M. Wylie*.

Roman Heilman, district attorney of *Dane County*, for the respondent.

ROSENBERRY, J. The act of traveling for one's own convenience outside of the way prepared for the public constitutes contributory negligence as a matter of law. See *Wheeler v. Westport*, 30 Wis. 392, and line of cases cited in *Sweetman v. Green Bay*, 147 Wis. 586 (132 N. W. 1111), at p. 603. We do not understand that *Sweetman v. Green Bay, supra*, overrules or modifies the doctrine established by the cases referred to. The question here is whether or not the facts in this case bring it within the rule. In *Wheeler v. Westport* it is said:

"This conclusion results in no change of the general rule that travelers are required to keep within the traveled way, but merely in defining its application to be not only to the way actually traveled and in most frequent use, but also to

those parts of the road contiguous to and immediately connected with such way, which the town, in the discharge of its duty, is required and presumed to have kept clear from dangerous defects and incumbrances. Such must, as it seems to us, in view of the authorities and of well settled principles regulating the duty of towns, be the true meaning and application of the rule; and if it is, then the question whether the plaintiff was negligent or not in walking where he did, was one of fact for the jury under the particular circumstances, and not one of law for the court."

We find nothing in the opinion or in the dissenting opinion in *Sweetman v. Green Bay,* 147 Wis. 586, 132 N. W. 1111, that tends to limit or modify this rule.

In the case at bar the plaintiff was not turning out for his own convenience or pleasure. He was obliged to turn out to comply with the law of the road. In turning out he turned farther to the right than he was required to do by the law of the road. Was he guilty of contributory negligence in so doing?

It is true that though there be a defect or obstruction within the limits of the highway, if it is not in the traveled part of the road, or so connected with it as to affect the safety and convenience of those using the traveled bed, the municipality is not responsible for an injury sustained by one in consequence of it. Whether or not an obstacle is so connected with the highway as to affect the safety or convenience of those using that part prepared for public travel has always been held, when doubt exists, to be a question for the jury. That is exactly the question presented by the facts in this case. Was the abutment so connected with the highway as to affect the safety of the plaintiff in his use of the traveled part of the highway? That being a question for the jury, the granting of the nonsuit was error.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

HUDSON, Administrator, Appellant, vs. TRUSTEES OF THE FUNDS AND PROPERTY OF THE PROTESTANT EPISCOPAL CHURCH IN WISCONSIN, imp., Respondents.

March 10—April 6, 1920.

Gifts: Absolute or to take effect in future: Gifts causa mortis: Reservation of interest on certificates of deposit: Effect: Evidence: Appeal: Discrepancies in testimony: Conclusion of trial court.

1. In an action by the administrator with the will annexed of the donor of three certificates of deposit to recover possession thereof from a defendant who claimed to hold them as trustee for a religious corporation, the evidence is *held* to show that the transfer to defendant was with the intention of relinquishing control and dominion over them.
2. It is the province of the trial court to reconcile, if possible, discrepancies in the testimony of a witness, and his conclusion will not be disturbed on appeal.
3. Where the defendant to whom testatrix had transferred the certificates of deposit during her lifetime made a notation thereon, as a result of a conversation had with those who assisted in drawing and executing her will, that testatrix "wishes the interest on this paid to her as long as she lives. She then wishes me to sign it over to" specified church trustees, the notation was not an admission by testatrix or the trustees that there was not a present, completed gift.
4. There being an absolute present gift of the certificates of deposit to the trustees of church property by means of the delivery of the certificates indorsed and the surrender by the donor of possession to the donee, reservation of the interest accruing on the certificates during her lifetime did not destroy the effect of the transaction as a present gift.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

One Amelia B. Trener had lived for a great many years in the village of Mazomanie and was a member of and took great interest in the welfare of the Episcopal church in that village. For about thirty years she and the defendant Mrs. Martha E. Gleason were near neighbors and intimate friends.

On January 4, 1919, Miss Trener, then being about eighty-three years of age and ill, was removed from her homestead to the home of Mrs. Gleason. At that time Miss Trener had certain certificates of deposit in her name and kept with her papers in a small tin box in her possession. On January 11th three of these certificates, one for $1,000 and two for $500 each, which had been issued to Miss Trener some months previously, were indorsed on the back by a Mrs. Kerr as follows: "January 11th, 1919, pay to the order of Martha E. Gleason," and each of such indorsements was then signed by Miss Trener and the three certificates so indorsed delivered to Mrs. Gleason and thereafter kept by her with her own papers and were never again in the possession of Miss Trener.

On January 21st Miss Trener executed her will, and as a result of conversation had at about that time with those who assisted in the drawing and executing of the will Mrs. Gleason further wrote on each of said certificates, with the intention of then stating her understanding of the situation in case of anything happening to her, the following statement:

"Amelia B. Trener wishes the interest on this paid to her as long as she lives. She then wishes me to sign it over to the Trustees of Funds and Property of the Episcopal Diocese of Milwaukee for the benefit of St. Luke's church, Mazomanie, Wisconsin."

On April 8th following Miss Trener died, and two or three days thereafter Mrs. Gleason added to the back of each of said certificates the following: "Pay to the order of the Trustees of Funds and Property of the Episcopal Diocese of Milwaukee," and signed the same "Martha E. Gleason."

Owing to questions arising as to whether the plaintiff, administrator of the estate of Miss Trener, or the trustees of the Episcopal diocese were entitled to them, Mrs. Gleason has retained possession, but expressly disavows any inter-

est in the same on her own behalf. Upon the trial without a jury in the court below, the circuit court found in effect that there had been an absolute gift *in præsenti* of the $2,000 represented by said certificates to Martha E. Gleason as agent for the defendant trustees and that such trustees were the owners thereof, and dismissing the plaintiff's complaint with costs. From such judgment the plaintiff has appealed.

For the appellant there was a brief by *W. L. Woodward* and *Gilbert & Ela,* all of Madison, and oral argument by *Frank L. Gilbert.*

For the respondents there was a brief by *Mason & Stephens* of Madison, and oral argument by *Vroman Mason.*

ESCHWEILER, J. The plaintiff, administrator with the will annexed of the deceased, Amelia B. Trener, insists that the evidence does not support the conclusion of the trial court that there was a valid and binding gift by Miss Trener to the defendant trustees.

Mrs. Gleason was examined in the county court with reference to the transactions between herself and Miss Trener, and later again examined on the trial in the court below. Much stress is laid by appellant upon the circumstance that in the examination in the county court Mrs. Gleason did not say, as she did in the circuit court, that she was told by Miss Trener, at the time the certificates were delivered to her, that she, Mrs. Gleason, was to hold them for the trustees, and also insists that proper and due significance was not given by the trial court to the recital quoted in the statement of facts placed upon the back of each of these certificates by Mrs. Gleason herself just after the execution of Miss Trener's will. That from these facts the appellant insists that the only proper conclusion to be drawn is that it was the intention of Miss Trener at the time of delivering the certificates to Mrs. Gleason that the title was not then to pass to the trustees, nor was her dominion over them intended to be relinquished until and after her death,

and, that being so, there was no present gift. Further, that Mrs. Gleason remained the agent of Miss Trener only and not of the defendant trustees in holding such certificates during the lifetime of Miss Trener. Appellant also claiming that there is no evidence to warrant a conclusion that it was intended as a gift *causa mortis* in that it was evidently not made in view of impending death and that death did not result to the donor from any then impending danger.

We are satisfied, however, from all the testimony of Mrs. Gleason, particularly that to the effect that Miss Trener said at the time she delivered these certificates so indorsed by her that she, Mrs. Gleason, was to take them and hold them for the defendant trustees and to sign them over to them at her death and to pay her, Miss Trener, the interest accruing thereon during her lifetime, that the trial court was justified in holding that there was a present, absolute gift.

There are possible discrepancies between her statement of the transaction while testifying in the county court and in the circuit court and with the indorsement that she made in her own handwriting on the back of these certificates, from which it may be argued that there was possible confusion in her own mind as to what was the exact direction or expressed intention of Miss Trener; yet it was the province of the trial court to reconcile, if possible, such matters, and his conclusion cannot be overturned.

The notation by Mrs. Gleason appearing on the back of the certificates is not of course an admission by the donor and therefore not binding as against her or the defendant trustees and was a proper subject of explanation by Mrs. Gleason when testifying.

We are satisfied that there was an absolute present gift to the defendant trustees by the delivery of the certificates so indorsed and surrender of possession and control over them by Miss Trener, and that the reservation of interest accruing thereon during her lifetime did not destroy the effect of

the transaction as a present gift. *Pirie v. Le Saulnier,* 161 Wis. 503, 154 N. W. 993; *Will of Klehr,* 147 Wis. 653, 133 N. W. 1105; *McNally v. McAndrew,* 98 Wis. 62, 73 N. W. 315; *Davis v. Ney,* 125 Mass. 590; *Bone v. Holmes,* 195 Mass. 495, 81 N. E. 290; *Meriwether v. Morrison,* 78 Ky. 572; *Ruiz v. Dow,* 113 Cal. 490, 45 Pac. 867.

By the Court.—Judgment affirmed.

CITY OF BARABOO, Appellant, vs. EXCELSIOR CREAMERY COMPANY, Respondent.

March 10—April 6, 1920.

Bridges: Running into bridge by automobile: Action by city for damage: Negligence: Defective condition of highway contributing to cause accident: Effect: Knowledge of city officers as to defect in highway: Ineffective repair by city: Evidence: Photographs: Purpose: Discretion of court: Trial: Special verdict: Statement of issues: Instructions: Appeal: Harmless error: Extending time to settle bill of exceptions: Courts: Policy to expedite final disposition of cases.

1. In order that a city may recover for damages to one of its bridges by being run into by defendant's automobile truck, it must appear not only that the driver of the truck was negligent, but that no defect in the highway contributed to produce the collision; and where the jury found against the city on both issues, any error as to the trial of one of them will not affect a judgment for the defendant, if the other was tried without error.
2. Photographs may be offered in evidence for the purpose of identifying persons, places, and things and to exhibit particular locations or objects, where it is important that the jury should have a clear idea of the same and where the photographs will better show the situation than will the testimony of witnesses.
3. The reception in evidence of a photograph rests largely in the discretion of the trial court; and where it was made clear to the jury that a photograph was offered by the defendant for the purpose of showing the manner in which the city had repaired the approaches to the bridge and not to show the

physical appearance of the highway at the time of the accident, the court did not abuse its discretion in receiving the photograph in evidence.

4. A special verdict calling for findings as to whether the driver of the truck was negligent, and, if so found, whether it proximately contributed to the collision, the insufficiency or want of repair of the highway and whether it proximately contributed to the injury, is sufficient, when submitted with proper instructions, it being unnecessary and bad practice to divide and subdivide the issues by questions in the nature of a cross-examination of the jury.
5. Where the approaches to the bridge had been repaired by the city under the supervision of its engineer and street commissioner, and the defect in the approach grew out of the manner in which such repairs were made, it was unnecessary to show any other facts to charge the city officers with actual or constructive knowledge of the defect.
6. Any want of ordinary care, no matter how slight, on the part of the plaintiff; which proximately contributes to the injury, amounts to contributory negligence.
7. While to constitute error for a refusal to charge the jury as requested, the request should be submitted to the court in writing before the argument is begun (Circuit Court Rule XXIII), counsel may properly, at the conclusion of the charge, call the attention of the court to inadvertencies, omissions, or errors in the instructions.
8. The action of the court in requiring that an appeal be taken within a certain time as a condition of an extension of the time for the settlement of the bill of exceptions will not be considered where the bill of exceptions was taken within the required time or without prejudice to appellant, the appeal presenting nothing but a moot question.
9. Any policy adopted by trial courts which tends to expedite the disposition of cases will not be frowned upon by the supreme court where it appears that no substantial rights of litigants have been prejudiced.

APPEAL from a judgment and order of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Affirmed.*

On the morning of the 11th day of September, 1918, defendant's truck, while being operated by an employee, collided with and damaged a bridge in the city of *Baraboo.* This action was brought to recover the resultant damages. The case was tried before a jury and a special verdict returned, in which it was found (a) that the driver of the

truck did not fail to exercise ordinary care in the manner in which he drove and conducted his car as he approached the bridge; (b) that the highway west of the bridge, and as the bridge was approached by vehicles coming east, in respect to the manner in which and the material of which it was constructed, was defective and insufficient; (c) that such defective and insufficient condition of the highway contributed to the collision. Upon this special verdict a judgment was rendered in favor of the defendant, and the plaintiff appealed.

The cause was submitted for the appellant on the brief of *V. H. Cady* of Baraboo, and for the respondent on that of *Grotophorst, Thomas & Quale* of Baraboo.

OWEN, J. The evidence shows that the westerly approach to the bridge was built of macadam, which had deteriorated and become rough, and that there were at least two pronounced holes, five or six inches deep, in close proximity to the bridge. In the summer of 1918 the city repaired the approach to the bridge by covering the macadam with material consisting largely of clay soil. When the weather was dry this material made a hard, dry surface, but after a rain the approach was soft and muddy, and this was especially true at the points where clay soil, to the depth of five or six inches, had been used to fill up the holes. Early in the morning of September 11th defendant's employee was hauling some cream cans to the depot. It had rained the night before, and the clay dressing placed upon the approach to the bridge had become soft and slippery, and the truck slued and struck the bridge, causing the damage complained of.

In order to entitle plaintiff to recover it must appear not only that the driver of the truck was negligent in the manner in which he managed the same, but that no deficiency of the highway contributed to produce the collision. The jury found both of these issues against the city. If either was

tried without error it will be unnecessary to consider alleged errors affecting the other. The errors assigned by appellant to impeach the verdict, so far as the deficiency of the highway is concerned, are as follows: (1) the reception in evidence of a photograph of the highway in question taken three weeks after the collision; and (2) the refusal of the court to submit as a part of the special verdict certain questions requested by the appellant. These will be considered.

1. The court received in evidence a photograph offered by respondent showing the condition of the highway as it approached the bridge three weeks after the collision. Appellant contends that this was error. It was not claimed by respondent that the photograph showed the condition of the highway at the time of the accident. It was introduced for the purpose of advising the jury of the nature of the top dressing with which the city had repaired the approach. The photograph reveals deep wheel tracks made in the mud and, as plainly stated by respondent's counsel, was offered for the purpose of showing this fact to the jury and not for the purpose of showing the physical appearance of the highway at the time of the accident. It is well established that photographs may be offered in evidence for the purpose of identifying persons, places, and things, and to exhibit particular locations or objects, where it is important that the jury should have a clear idea of the same, when the photographs will better show the situation than will the testimony of witnesses. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 324, 80 N. W. 644. The reception of a proffered photograph rests largely in the discretion of the trial court (*Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816), and in order to construe the reception of this photograph in evidence as reversible error it is necessary to find that the court abused its discretion in the premises. Had it not been made clear to the jury that the photograph did not purport to represent the condition of the street on the morning of the accident, its reception undoubtedly would have been

error. But, as above stated, it was made clear that this was not the purpose of the offer, but that it was to show the fact that the macadam street had been covered with a deep coating of clay soil, which in wet weather became soft and muddy, thereby presenting a treacherous surface to one who did not know the nature or depth of the top dressing. We cannot say that the court abused its discretion in receiving the photograph for this limited purpose.

2. The special verdict comprised but four questions, calling for findings of the jury as to the negligence of the driver of the truck, and, if negligence should be found, whether it proximately contributed to the collision; the insufficiency or want of repair of the highway and whether it proximately contributed to the collision. It must be conceded that these were the ultimate facts upon which rested the right of the city to recover. It was a model verdict when submitted with proper instructions. The appellant city complains because the verdict did not include some sixteen questions requested by it. Necessarily these questions divided and subdivided the issues as submitted and were in the nature of a cross-examination of the jury. This court has repeatedly disapproved such practice.

Appellant especially complains of the refusal of the court to submit certain questions calling for findings concerning the knowledge, actual or constructive, on the part of the city officers of the defective condition of the highway. It claims these questions should have been submitted by reason of provisions of the city charter to the effect that:

"The city shall not be liable for any damages growing out of any sidewalks, streets, drains, sewers, gutters, ditches or bridges in said city being in a defective or dangerous condition or out of repair, unless it be shown that previous to the happening of the same, the common council, or some member thereof, or the street commissioner, had actual knowledge thereof; and no knowledge of such condition will be presumed unless the defect out of which the same occurred, existed four weeks before such damages occurred."

The evidence shows without dispute that the macadam was in a state of deterioration in the summer before the accident, and that because of this fact the city, through its proper agencies and under the supervision of the city engineer and the street commissioner, essayed to place it in a state of proper repair by surfacing it with the clay-soil material. The defect in the highway, as found by the jury, grew out of the very manner of its repair by the city officers. The only conclusion is that the city officers knew all about the condition of the street, and it was unnecessary to show any other facts charging them with notice, either actual or constructive. *Woodward v. Boscobel,* 84 Wis. 226, 54 N. W. 332; *Brunette v. Gagen,* 106 Wis. 618, 82 N. W. 564.

Perhaps one other assignment of error is worthy of notice. After the court had charged the jury respondent's counsel asked it to further charge the jury as follows: "If you find that the condition of the highway only proximately contributed but slightly to the causing of the collision, you will answer the fourth question 'Yes.'" Appellant contends that the instruction is not a correct statement of the law, and, further, that it should not have been given because not seasonably requested. We regard the instruction a correct statement of the law applicable to the issues. It is a well settled principle of negligence law that any want of ordinary care, no matter how slight, on the part of the plaintiff which proximately contributes to the injury amounts to contributory negligence. We can see no reason why this principle is not applicable in the case of a city suing for damages to which the defective condition of its streets contributed.

It is claimed that by virtue of sec. 2, Circuit Court Rule XXIII, the request should have been submitted to the court in writing before the argument of the case to the jury was begun. This is true, in order to constitute error for refusal to charge the jury as requested. But it is the privilege, if indeed it is not the duty, of counsel at the conclusion of the charge to direct the court's attention to inadvertencies, omis-

sions, or errors therein. *Brahmsteadt v. Mystic Workers of the World,* 152 Wis. 580, 140 N. W. 354. Error cannot be predicated upon efforts of counsel thus made to promote a full and fair submission of the issues to the jury. In the instant case the court appreciated the propriety of the instruction immediately upon its suggestion. The result was to promote rather than to defeat justice, and the incident does not remotely savor of error.

We see no error attending the submission of the city's negligence to the jury. The jury having found against the city in this respect, it cannot recover, and it is therefore unnecessary to consider assignments of error attending the trial and submission of the issue of defendant's negligence.

The city also appeals from an order extending the time for the settlement of a bill of exceptions because the court imposed as a condition of relief the requirement that the appeal should be taken in time to have the case placed upon the January calendar of this court. The appeal was taken in time to have the case placed upon the present calendar in accordance with the condition of the order, the bill of exceptions was duly settled, the case has been properly presented, and the rights of the city have in no way been prejudiced. Under the circumstances the appeal presents nothing but a moot question. The result of the order has been to expedite the final disposition of the case, as it is to be inferred that but for the order the city attorney would have delayed his appeal and protracted the litigation for another year or thereabouts. As it is, the final decision of this court is rendered within a year after the commencement of the action, the summons having been served April 8, 1919. While this dispatch in the disposition of litigation is not unusual in this state, it is to be regretted that it is not more general. We do not want to make this incident the subject of a lecture, but it rather forcibly suggests that upon the dilatory lawyer rests much of the blame for the law's delays. The members of the bar, above all others, should shield the

courts from unjust criticism. Protracted litigation breeds dissatisfaction with the courts and robs them of the people's confidence. A distrust of the courts is most deplorable in a democracy. None appreciate this more keenly than the members of the bar, and none can do so much to inspire confidence in the courts as can the legal profession. The times call for executive as well as professional ability on the part of the lawyers. If they will vigorously press their cases, little justification for complaints concerning the law's delays will be found in this jurisdiction. We may say, as a general proposition, that any policy adopted by trial courts tending to expedite the disposition of cases will not be frowned upon by this court, where it appears that no substantial rights of litigants have been prejudiced.

By the Court.—Judgment and order appealed from affirmed.

OUTAGAMIE COUNTY BANK OF APPLETON, Respondent, vs. TESCH, imp., Appellant.

March 11—April 6, 1920.

Principal and agent: Implied authority to execute or negotiate commercial paper: Possession of undelivered note as implied authority: Liability of agent acting without authority: Fraud: Warranty of authority: Evidence.

1. A son who signed his father's name to a guaranty on the back of a promissory note which had been indorsed by the father and his own name thereunder as agent, cannot be held liable on the note unless there was some element of deceit or fraud in what he did or an express or implied warranty on his part that he had authority to act as agent.
2. In an action against the son the evidence is *held* conclusively to negative any element or act of fraud or deceit practiced by the son toward the payee of the note.
3. Where a new note sent to a prior guarantor for his signature to a guaranty on the back of the note was returned to the payee by the son of the guarantor with his father's indorsement, but without his father's signature to the guaranty, the

mere possession of the note by the son carried no implication of authority to make a substantially different contract than that evidenced by the indorsement on the back of the note.

4. The rule as to implied agencies is given a much more limited and strict application in the matter of the execution or negotiation of commercial paper than under other circumstances.

APPEAL from a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

Plaintiff was payee in a promissory note for $430 dated June 20, 1916, which had been signed by defendants Mielke and Douglas as makers and against whom judgment was entered by default. The defendant William Tesch had indorsed his name upon the back of this note, and below such indorsement there was stamped an ordinary form of guaranty and waiver. Just below this guaranty the defendant and appellant, *William C. Tesch,* who was the son of the defendant William Tesch, signed his father's name as follows: "Wm. Tesch by *Wm. C. Tesch.*"

The note in suit was one of a series of notes on which William Tesch, the father, had been a prior guarantor and in one instance only an indorser; the last of such notes falling due at the date given on the face of the note in suit.

A jury trial was waived, and on the hearing the plaintiff's cashier testified in substance that he had telephoned to William Tesch, the father, about the prior note, and sent up a new note to be signed with the stamped guaranty and waiver. Some time after June 20th *Tesch, Jr.,* brought the note to the bank and the cashier then noticed to his surprise that the signature of the father was above the stamped guaranty and said to the son: "Why did your father sign above the waiver for?" and the son said, "Well, that is all right, I will sign below." The son then and there did sign right below the stamped guaranty and turned it over to the bank. He, the cashier, did not ask questions about this signature. This was about the first time that *Tesch, Jr.,* had

been in the bank, and he, the son, did not have anything to do with this note transaction up to that time. The son probably paid the interest due on the old note at that time. The cashier did not tell the son to sign anything; he signed himself, he knew all about it. He didn't tell the son he was a guarantor, didn't talk with him about it whatever, and did not ask him if he was his father's agent. The cashier assumed he was; the son did not say he was. The son had done no business for the father in the bank before. The cashier refused to accept the new note without the indorsement signed below the waiver. He relied as cashier upon the guaranty because he assumed the son to be his father's agent. No protest of the note was made.

At the close of plaintiff's testimony the court granted the motion of the defendant William Tesch, the father, to dismiss the action as against him on the ground that there was no liability established against him either as indorser or guarantor.

The son, *William C. Tesch,* also made a motion to dismiss the action as to him, which was denied.

Further testimony was taken in behalf of the defendant, but is not deemed material on this appeal.

The court found, among other things, as follows:

"That at the time of delivering the note which is the subject of this action to the plaintiff bank, the defendant *William C. Tesch,* in consideration of the bank delivering up the old note, guaranteed the present note, and waived protest by William Tesch, signed by himself *William C. Tesch;* that at the time of signing this guaranty *William C. Tesch* had no authority from his father, the defendant William Tesch."

As conclusions of law:

(1) That the defendant William Tesch (the father) is not liable on said note, and the action against him was properly dismissed.

(2) That the defendants Mielke and Douglas are liable

as makers and the defendant *William C. Tesch* is liable as guarantor on said note; and directed judgment for the amount thereof against such three defendants.

From the judgment so entered against him the defendant *William C. Tesch* has appealed to this court.

For the appellant the cause was submitted on the brief of *C. G. Cannon* of Appleton.

For the respondent there was a brief by *Morgan & Benton* of Appleton, and oral argument by *John Morgan.*

ESCHWEILER, J. The defendant *William C. Tesch* could not be held liable upon the written guaranty itself because there were no words thereon which bound him personally, the contrary appearing from the nature of the signature, which showed on its face that he purported to act as agent only. He can be held liable, if at all, either on the ground that there was some element of deceit or fraud in that which he did, or on the ground that there was an express or implied warranty on his part that when he assumed to act as agent he had authority so to do. *McCurdy v. Rogers,* 21 Wis. 197, 202; *Oliver v. Morawetz,* 97 Wis. 332, 339, 72 N. W. 877; *Haupt v. Vint,* 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. N. S. 518 and note; *People's Nat. Bank v. Dixwell,* 217 Mass. 436, 105 N. E. 435; *Williams v. De Soto Oil Co.* 213 Fed. 194.

The evidence in the record conclusively negatives any element of active fraud or deceit practiced by the defendant towards the plaintiff's cashier in this transaction. So the judgment cannot be supported upon the theory of any tort having been committed by this defendant.

Under the testimony of plaintiff's cashier the son had transacted no former business with the bank either in connection with the transactions concerning this note and the prior notes or any business for his father. The cashier neither asked nor did the son make any statement from which it might be inferred that he came there with any such

authority, and there was therefore no express assumption of such authority.

Assuming, as we must, upon the record and under the conflict of the evidence here on the point, that the son brought the note as well as the interest to the bank at the time in question, although the defendant's testimony is that the note was already there when he came with the interest, yet the bringing to the bank or having possession of the note carried no implication of authority to make a substantially different contract than that already evidenced by the indorsement of the father. From the situation thus presented the cashier had no right to assume that the son had any authority to make another and different contract or to bind his father in some other and different form than that which the father already had done.

The acts of plaintiff's cashier in this case must be considered in connection with the rule as to implied agencies, which in the matter of execution or negotiation of commercial paper is much more limited and more strictly applied than under other circumstances. *Pluto P. Co. v. Cuba City State Bank,* 153 Wis. 324, 329, 330, 141 N. W. 220; 31 Cyc. 1381; *Morris v. Friend,* 116 Ark. 424, 173 S. W. 199; *Swift & Co. v. Miller,* 62 Ind. App. 312, 113 N. E. 447; *Merchants' Nat. Bank. v. Nichols & Shepard Co.* 223 Ill. 41, 49, 79 N. E. 38. He was bound to look before he leaped at the conclusion to which he came.

It was manifestly to carry out the cashier's desire, rather than by any assumption of agency for the father, that the son signed as he did below the guaranty. There was therefore no basis for any substantial or good-faith reliance by the cashier upon the mere acquiescence by the son in the suggestion of the cashier that the obligation of the father should be changed from that which it already was, of indorsement, to that of a guarantor, as being an implied representation of authority upon which plaintiff might recover.

The situation is manifestly different from that disclosed

in the cases relied upon by plaintiff, where the individual sought to be held by his acts or statements gave the other party reason to believe that he had the power or authority which he was assuming to exercise, as in such cases as *Roberts v. Goodlad,* 167 Wis. 318, 166 N. W. 646; *Wis. F. Co. v. Watson,* 160 Wis. 638, 152 N. W. 449; *Dennison v. Austin,* 15 Wis. 334.

Under the facts in this case there is not sufficient foundation upon which a judgment against the appellant could properly be based, and his motion to dismiss the complaint should therefore have been granted, and the judgment against him must be reversed.

By the Court.—Judgment against the appellant, *William C. Tesch,* is reversed, and the cause remanded with directions to dismiss the complaint as to him.

SUICK, Respondent, vs. KROM, Appellant.

March 11—April 6, 1920.

Libel and slander: Storekeeper accusing customer of theft: Privilege: Damages: Repetition of slander: Circulation of incident by plaintiff: Evidence: Positive and negative testimony: Credibility of witnesses: Instructions: General exception to instruction good in part: Effect.

1. The positive testimony of a credible witness as to a particular matter is entitled to greater weight than the negative testimony of an equally credible witness as to the same matter; and an instruction as to positive testimony outweighing negative testimony which did not include the element of equal credibility of the witnesses, was error which requires reversal of the case.
2. An instruction as to positive testimony outweighing negative testimony which did not define what constitutes negative testimony was objectionable.
3. In an action for slander, the testimony of witnesses who testified positively that defendant did not speak the words charged did not constitute negative testimony. Negative testimony relates only to the testimony of a witness who had an opportunity to see an occurrence testified by some other witness

to have taken place, that he did not see it, or of one who had an opportunity to hear or know of an occurrence testified positively by some other witness to have happened, that he did not hear it or recollect it.

4. A single exception to a portion of a charge containing independent propositions, some of which are proper, is too general and will be disregarded on appeal.
5. An instruction which would permit the jury, in determining plaintiff's damages, to consider the fact that the plaintiff herself told a number of her friends of the incident, is erroneous, as the defendant is not responsible for the circulation of the slander by the plaintiff.
6. A storekeeper who, in the presence of others, accused plaintiff of being a thief, is liable for injury to plaintiff's feelings and to her reputation caused by circulation of the charges among her friends and neighbors, not including the damages sustained by reason of plaintiff herself circulating the story.
7. Such accusation was not privileged on the ground that the defamatory words were spoken in defense of defendant's property, even though he was under the impression that plaintiff was in fact stealing his goods, as it was not necessary nor justifiable for him to publicly accuse plaintiff of stealing.

APPEAL from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Reversed.*

Action for slander, growing out of the following circumstances: Defendant was the proprietor of a department store in the city of Antigo. On the evening of January 4, 1919, the plaintiff, with one Mamie Hayes, went to said store and made some purchases. As she passed out of the store and after she had reached the sidewalk, defendant came to the door and, in the presence and hearing of said Mamie Hayes and, as the complaint alleges, a large number of other people, shouted to the plaintiff in a loud voice, "Do you want to be arrested? Do you want to be arrested?" Whereupon the plaintiff inquired: "For what?" To which the defendant replied: "For stealing that package of silk you have under your arm." The jury returned a general verdict assessing plaintiff's damages at the sum of $625, upon which verdict judgment was rendered in favor of the plaintiff and against the defendant, and the defendant appeals.

For the appellant there was a brief by *Chas. H. Avery* and *Geo. W. Latta,* both of Antigo, and oral argument by *Mr. Avery.*

For the respondent there was a brief by *Henry Hay* of Antigo, and oral argument by *Irvin White* of Madison.

OWEN, J. The court instructed the jury as follows:

"I further instruct you that if you find that some of the witnesses sworn in this case testified negatively as to any material facts and circumstances and others testified positively on the same facts and circumstances, the positive testimony will outweigh that of the negative. The testimony of one witness who has testified positively as to a material fact or circumstance within his or her knowledge will outweigh that of several witnesses who testify negatively as to the same facts and circumstances."

This statement of the rule ignores the element of equal credibility of the witnesses, which is always to be included in an instruction upon this subject. *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342, and cases cited. The true rule is that the positive testimony of a credible witness as to a particular matter is entitled to greater weight than the negative testimony of an equally credible witness as to the same matter. The instruction under consideration simply told the jury that any witness who testifies positively to any material fact or circumstance is entitled to more weight than the testimony of any witness who testifies negatively, and left out altogether the consideration of the equal credibility of the witnesses. For this error the case must be reversed. Although an exception was not preserved as to the point, we are prompted to say that the instruction is further subject to criticism because it fails to tell the jury what constitutes negative testimony. In this case some of defendant's witnesses testified positively that he did not speak the words charged. While such testimony did not constitute negative testimony, the jury might well

have understood that the court referred to all witnesses who testified that the words charged were not spoken. Negative testimony relates only to the testimony of a witness who had an opportunity to see an occurrence testified by some other witness to have taken place, that he did not see it, or of one who had an opportunity to hear or know of an occurrence testified positively by some other witness to have happened, that he did not hear it or recollect it. *Anderson v. Horlick's M. M. Co., supra.* This idea, however, is not necessarily conveyed by the mere term "negative testimony." The jury might well have thought that the testimony of any witness who testified that the words were not spoken constituted negative testimony. Upon another trial, if the jury should be charged in this particular, care should be taken to define the meaning of negative evidence, as indeed should always be done when the jury is charged upon the subject.

The court further charged the jury:

"In considering those actual or compensatory damages you can take into consideration what would be the injury to plaintiff's health, if her health was injured, the way it affected her business, if it did affect her business, the disgrace and injury to her feelings, if said in the presence and hearing of others, as well as to her reputation by having such charges as those made, and in the way they were made, if made at all, and circulated among her relatives, her friends and her neighbors."

This portion of the charge was the subject of an exception by the defendant. It embodied four distinct elements which the jury was authorized to take into consideration in fixing the actual or compensatory damages. The only portion thereof to which appellant objects is that which allows the jury to take into consideration the circulation of the charges among her relatives, friends, and neighbors. It is the rule that a single exception to a portion of a charge containing independent propositions, some of which are proper,

is too general and will be disregarded. *Kersten v. Weichman,* 135 Wis. 1, 5, 114 N. W. 499, and cases there cited. While the exception is too general to entitle appellant to a review of the assigned error, in view of the fact that a new trial must be had we will briefly state our views with reference thereto.

There was evidence in the case that the plaintiff herself told a number of her friends of the incident. The charge as given would permit the jury to give consideration to such circulation. Manifestly, defendant should not be responsible for damages resulting from the circulation of the incident by plaintiff, for which reason the charge was erroneous.

The preponderance of authority supports the proposition that one who utters a slander is not responsible for the unauthorized repetition thereof. *Terwilliger v. Wands,* 17 N. Y. 54; *Hastings v. Stetson,* 130 Mass. 76; *Mills v. Flynn,* 157 Iowa, 477, 137 N. W. 1082. The soundness of the reason supporting this rule is challenged by some judges and text-writers, especially Mr. Sutherland in his work on Damages (3d ed., § 1222), the suggestion being that it is inconsistent with the universal doctrine that a tortfeasor is responsible for the proximate consequences of his acts, and that one who originates and publishes a scandalous story should reasonably anticipate its further circulation. This rule in its full force has not yet been adopted in this state, and we do not consider the question now before us and express no opinion with reference to the soundness thereof. There was no evidence in the case that there was any repetition of the charge that plaintiff stole silk from the store of defendant. It does appear, however, that the incident, that is, that *Abe Krom* accused *Martha Suick* of stealing silk, was the subject of more or less gossip. This the defendant should have anticipated when he made the accusation publicly as he did. He should have foreseen that as a natural and proximate consequence thereof the occurrence would become the subject of talk and gossip. This did not amount to a repetition of the slander, but was a circulation of the

fact that defendant had charged the plaintiff with stealing silk from his store.

In discussing a situation of this kind it was said in *Nott v. Stoddard,* 38 Vt. 25, 29:

"It is insisted by the defendant that if others slandered the plaintiff by repeating the slander, they, and not the defendant, are responsible for such repetition. This is undoubtedly true as to such persons as repeated the accusation under such circumstances as to make themselves liable to an action for such repetition of the slander. . . . The fact that the defendant had made such accusation would almost inevitably gain more or less notoriety in the neighborhood from the publication of the slander by the defendant, and the extent of the injury to the plaintiff would be dependent somewhat upon the degree and extent of this notoriety. The defendant is responsible for the necessary consequences of his wrongful act, and this evidence was admissible as tending to show the extent of such consequences, that is, the extent of the report that the defendant had thus accused the plaintiff."

This appeals to us as sound doctrine, and applicable here. The extent to which the incident was discussed among plaintiff's friends and neighbors contributed to her disgrace, increased the injury to her feelings, and injuriously affected her reputation. We think it was proper for the jury, in determining the amount of damages, to take into consideration the extent to which the fact that the accusation had been made had been circulated among plaintiff's friends and neighbors, excluding of course the circulation for which she was responsible.

Defendant further contends that the defamatory words were privileged, on the ground that they were spoken in defense of his property. This is not entitled to serious consideration. Even though the defendant was under the apprehension that plaintiff was taking silk inadvertently or deliberately from his store, it was not necessary, nor was it justifiable, for him to publicly accuse plaintiff of stealing.

By the Court.—Judgment reversed, and cause remanded for a new trial.

STATE EX REL. SCHERTZ, Appellant, vs. SPIEGEL and others, Respondents.

March 11—April 6, 1920.

Mandamus: Writ not issued where ineffective to afford relief.

A writ of *mandamus* to compel a school board to provide transportation for relator's children to and from school, under sec. 40.16, Stats., providing that where schools are suspended in a school district the school board shall provide transportation for children of a certain age living more than one mile from the nearest school, for a period of at least six months during the school year, was properly denied, where the final hearing in the proceedings was not concluded until the eleventh month of the school year and such writ could afford relator no relief.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

This action was begun by relator on March 9, 1919, when he filed a petition for a peremptory writ of *mandamus* commanding the defendants to provide transportation for the school children of district No. 5, including relator's children, and to enter into contract with some suitable person for such transportation as provided in sec. 40.16 of the Statutes of 1917. The petition alleges that at an annual school meeting of district No. 5 in July, 1918, and at an adjournment thereof held on August 1, 1918, the electors of the district voted to suspend all schools in the district for the approaching school year and to furnish and provide transportation for all children of school age to the school in joint district No. 1 of the town of Fairbanks and village of Tigerton, and that the schools of district No. 5 were suspended accordingly; that the school board of district No. 5 failed to engage a person to transport the children of the district as required by law, engaging, however, one Harvey Fink, by verbal agreement, to perform such service; that the school board failed to enter into a written contract with Harvey Fink as required by law and failed to require

Harvey Fink to furnish a bond in the sum of $300 or in any amount whatever; that the school board failed to require Harvey Fink to furnish a safe and comfortable conveyance, and that the conveyance furnished by Harvey Fink was utterly inadequate and unsafe; that Harvey Fink is not a trustworthy and responsible person to have the charge of the children; that he has so failed in his duty that the two children of relator have been able to attend the school in the adjoining school district only eleven days since September 1, 1918.

An alternative writ was granted by the court. The defendants demurred to the petition, which demurrer was sustained. An amended petition was filed April 3, 1919, which defendants moved to quash. A hearing was had on this motion May 12, 1919. On the argument of this motion defendants asked leave to withdraw such motion to quash and for permission to file a motion to make more definite and certain. Such leave was granted, and after hearing argument on the motion to make more certain and definite the court on May 21, 1919, made an order commanding the relator to make his petition more certain and definite. In compliance with this order a second amended petition was filed in which was set forth, in addition to the facts already pleaded, the minutes of the school meetings at which the decision to suspend the schools was reached.

Defendants again moved to quash, and after argument the court made an order granting the motion to quash and providing that the action be dismissed with costs. Judgment was entered on such order, from which judgment relator appeals.

For the appellant there was a brief by *F. Y. King* of Tigerton and *A. M. Andrews* of Shawano, attorneys, and *Henry Hay* of Antigo and *Geo. Y. King* of Tigerton, of counsel; and the cause was argued orally by *Geo. Y. King*.

For the respondents the cause was submitted on the brief of *Eberlein & Larson* of Shawano.

SIEBECKER, J. The trial court held that the remedy by *mandamus* would be fruitless in this case because the relief sought could not be enforced when the proceeding came to an issue and hearing on the original petition. The law (sub. (1) (c), sec. 40.16, Stats.) provides that when all schools are suspended in a school district by vote of the electors, the school board shall "provide transportation to and from school for a period of at least six months during the school year . . . for all children between the ages of six and sixteen residing more than one mile from the nearest school." The facts alleged show that the school year had proceeded into the ninth month when the first hearing on the petition was before the trial court. The final hearing was concluded in the eleventh month of the school year. It is obvious that *mandamus* could afford no relief to relator under these circumstances. We think the circuit court very properly held: "The conditions claimed by the relator have long since passed into history, and were before the proceedings were commenced, so a judgment now entered would be without force and of no benefit to him [the relator], whatever." Since the writ at the time of trial, as held by the trial court, was properly denied, consideration of the various questions argued on this appeal are not necessarily involved in determining whether or not appellant is entitled to the writ. *State ex rel. Smith v. Drake,* 83 Wis. 257, 53 N. W. 496; *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482; *State ex rel. Treat v. Hammel,* 134 Wis. 61, 114 N. W. 97.

By the Court.—The judgment appealed from is affirmed.

FORD MOTOR COMPANY and another, Appellants, vs. MAEDER, Respondent.

March 11—April 6, 1920.

Sales: Conditional sale contract: Time of payment not specified: Filing not constructive notice.

The filing of a conditional sale contract in the proper office, no time being fixed in the contract for the payment of the purchase price of the article sold, is not constructive notice of the sale, such contract not being entitled to filing under sec. 2317, Stats.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

Action of replevin to recover possession of a Ford touring car sold by one McLeod, a subagent of the *Marathon Motor Car Company,* to the defendant. McLeod did not sell the car as agent of the *Marathon Motor Car Company,* but as the owner thereof. He had previously bought it of the *Marathon Motor Car Company* under a conditional sale contract on file in the city clerk's office at Wausau, the proper place for its filing.

The provisions in the contract for payment of the purchase price of $378 are as follows:

"Of which I agree to pay fifty and 00-100 dollars ($50) upon acceptance in writing of this order, and the balance of three hundred twenty-eight and 40-100 dollars ($328.40) within forty-eight (48) hours after I have been notified by the company through its duly appointed limited agents that automobile is ready for delivery." . . . "It is expressly agreed that the legal title to the said automobile to be delivered to me under this agreement shall be and remain in the company until the full purchase price thereof, as above stipulated, shall have been paid in money to the company."

The bill of sale attached to the contract contained this clause as to payment: "and in consideration of the sum of three hundred seventy-eight and 40-100 dollars ($378.40) to first party in hand paid or to be paid, does hereby sell,"

etc. Across the face of the agreement is written in long hand, "Time sale. Return bill of sale to agent," and on its face and on the face of the bill of sale are stamped with a rubber stamp, "Car sold on time. Return bill of sale to agent." The trial court held that the contract was not entitled to filing, and, since the undisputed proof showed that defendant had no actual notice of any infirmity in McLeod's title, he was the owner of the car and entitled to possession thereof. From a judgment entered accordingly the plaintiffs appealed.

For the appellants the cause was submitted on the brief of *Bird, Okoneski & Puchner* of Wausau.

M. W. Sweet of Wausau, for the respondent.

VINJE, J. It will be noticed that neither in the contract for the purchase of the car nor in the bill of sale is the time for payment specified. Indeed, there is much force in the argument of defendant that the contract and bill of sale require payment of the full purchase price before delivery of the car can be made to the purchaser. But, treating it as a time sale, there is no way of ascertaining the time of payment. Sec. 2317, Stats. 1917, provides that the "effect of such filing shall not extend for more than one year after the time fixed for payment of the contract price or for the performance of the other conditions of such sale." This clearly contemplates that the time of payment, where there are no other conditions, must be fixed in the contract filed in order to give notice. Prospective purchasers are entitled to know definitely when the effect of the filing expires, and if the contract is silent as to time of payment the filing can give no notice to any one because it does not comply with the statutory requirement of fixing the time of payment, and hence is not entitled to filing. The suggestion that it ought to be held good for one year after the date of the contract is not well taken. The statute makes no such provision and

this court can make none. To secure the benefit of the statute it must be substantially complied with.

The plaintiff contends that, though the statute does not apply, the contract is nevertheless valid though not filed, and cites *Lillie v. Dunbar,* 62 Wis. 198, 22 N. W. 467; *Wadleigh v. Buckingham,* 80 Wis. 230, 49 N. W. 745; *Monitor M. Co. v. Jones,* 96 Wis. 619, 72 N. W. 44; and *Mississippi R. L. Co. v. Miller,* 109 Wis. 77, 85 N. W. 193. In the first case it was found that the purchaser had actual notice, and besides, the subject matter was standing timber—real estate,—and the purchaser was chargeable with the seller's record title. The same is true as to the last case. In *Wadleigh v. Buckingham,* 80 Wis. 230, 49 N. W. 745, the contract was entitled to filing and was filed, and of course held to be notice to third parties. In *Monitor M. Co. v. Jones,* 96 Wis. 619, 72 N. W. 44, the contracts were held to be commission contracts and not contracts of conditional sale and were not entitled to filing and were not filed. Since they were not contracts of conditional sale, the statute did not apply and the title never passed out of plaintiffs even as against third persons. Here we have a clear conditional sale contract which passes title as to third parties without notice. It was undisputed that defendant had no notice except such as the filing of the contract might give, and since the contract was not entitled to filing he had no notice.

By the Court.—Judgment affirmed.

WINSLOW, C. J., and KERWIN and ROSENBERRY, JJ., took no part.

CHRISTIAN, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

March 11—April 6, 1920.

Railroads: Federal control: Service of process on company: Vacation of service of summons: Appeal: Return of motion papers without clerk's certificate that they were all the original papers: Bill of exceptions.

1. On an appeal from an order vacating service of the summons which recited that it was made on the summons, the return of service, the records and proceedings, and an affidavit in support thereof, and that an affidavit in opposition thereto was filed, no bill of exceptions was needed, and it was sufficient for the clerk to return all the original papers, although properly he should have certified that the papers returned by him were all the originals used on the hearing of the motion.
2. The President, in taking control of the railroads under the federal control act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), did not take control merely of the physical properties, but of the entire organization, including officers, directors, and employees.
3. Under such act, a railroad freight agent during the period of federal control was an agent of the company and a proper person upon whom to serve the summons against the company, under sub. (6), sec. 2637, Stats. 1917.

APPEAL from an order of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Reversed.*

April 7, 1919, the plaintiff, who was in the railway service, sustained an injury. At the time of the injury the federal government was in control of the property of the defendant company. The suit was begun by a service of the summons and complaint upon one J. P. Dooley on October 27, 1919. There was a motion to set aside the service of the summons and complaint, upon the ground that Dooley was not the agent of the defendant company, and upon that motion Dooley made an affidavit, of which the following is the material part:

"That on October 27, 1919, he was not in the service or employ of defendant, the *Great Northern Railway Company,* and was not on such day an agent, servant, or em-

ployee, or representative, in any capacity, of the *Great Northern Railway Company,* a corporation, but that on said October 27, 1919, he was and ever since December, 1917, has been and now is an agent and employee of the United States government, serving the director general of railroads in the capacity of freight agent."

It was further alleged in the affidavit that all of the persons, servants, employees, officers, or representatives serving or managing or controlling or operating the *Great Northern Railway Company* property in the state of Wisconsin were each and every one of them employed by and in the service of the director general of railroads.

The trial court granted the motion, and from the order vacating the service the plaintiff appeals.

For the appellant there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

For the respondent there was a brief by *J. A. Murphy* and *H. G. Pickering,* both of Superior, and oral argument by *Mr. Pickering.*

ROSENBERRY, J. The defendant has moved to dismiss the appeal for the reason that no bill of exceptions was settled. It is the contention of the defendant that sec. 2872, Stats. 1917, which provides that written exceptions to orders made before judgment may be filed with the clerk with a written notice of entry of same, and be incorporated with the bill of exceptions, which may thereafter be settled, requires a bill of exceptions to be settled in order to have a review of the ruling of the trial court upon appeal from an order.

The motion to set aside the service of the summons and complaint was based upon the affidavit of J. P. Dooley, upon the summons returned, upon return of service thereon, and upon the records and proceedings in the action. Upon the hearing there was filed in opposition to the motion the

affidavit of W. P. Crawford. The order recites: "said motion being based upon the summons returned in said action and upon the return of service thereon, and upon the records and proceedings had in said action; and upon the affidavit of J. P. Dooley;" and recites further the filing of the affidavit of W. P. Crawford in opposition to said motion. Written exception to the order was filed within the time required and in due form. Upon the appeal the clerk returned all of the original papers, including the affidavits referred to in the order of the court. Under the circumstances we think this is sufficient. *Binder v. McDonald,* 106 Wis. 332, 82 N. W. 156. It is not claimed that there was any oral testimony taken upon the hearing or that any matters other than those referred to were considered by the trial court. While the return of the clerk does not, as it should (*Carpenter v. Shepardson,* 43 Wis. 406), certify that the papers returned on the appeal are all the originals used on the hearing of the motion, the papers used are sufficiently identified in this case by the reference made to them in the recitals in the order of the court. *Glover v. Wells & Mulrooney G. Co.* 93 Wis. 13, 66 N. W. 799. The motion to dismiss the appeal is denied.

Upon the merits one question is presented: Was J. P. Dooley at the time of the service of the summons and complaint upon him the freight agent of the *Great Northern Railway Company?* Sub. (6), sec. 2637, Stats. 1917, provides that service may be had against a railway company upon the station, freight, or ticket agent of the company who shall reside within the county.

A decision of this question involves a consideration of the status of the railway company, its officers, agents, and employees during the period of federal control. The federal control act (40 U. S. Stats. at Large, 451, ch. 25) provided that carriers "while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in

so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carrier and judgments rendered as now provided by law. . . ." It further authorized the President to enter into contract with the carriers in relation to matters therein described with great particularity, "in order that the property of each carrier may be returned to it in substantially as good repair and substantially as complete equipment as it was at the beginning of federal control." By act of Congress passed August 29, 1916, the President was authorized "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." On December 26, 1917, pursuant to the authority conferred upon him, the President issued a proclamation by which he took possession and assumed control of each and every system of transportation and the appurtenances thereof within the United States, and by such proclamation it was directed that "Until and except so far as said director shall from time to time otherwise by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies."

While the President took absolute and undivided control of the carriers of the country, and while during the period of federal control they were wholly and absolutely within the jurisdiction of the federal government acting through the proper executive agencies, the purpose of the proclamation, as well as the clear intent and purpose of the law, was

that the President should take possession of the carrier systems as systems. The President did not take control, and neither the language of the act nor the proclamation indicates that he undertook to take control, merely of the physical properties of the carriers, but he took over the complete system, that is, the entire organization, including the officers, directors, and employees, who transacted the business in the name of the company. Men were hired and discharged and their duties prescribed and compensation paid by the same organization which prior to the time of federal control had performed the like offices. The power of the President was exerted not immediately and directly upon the employees, but through the organizations which theretofore had handled the various properties. Dooley was therefore the agent of the defendant company, and a proper person upon whom service might be made. The act providing for the termination of federal control, approved February 28, 1920, defines federal control as "the possession, use, control, and operation of railroads and systems of transportation," and provides that "the President shall then relinquish possession and control of all railroads and systems of transportation." We find nothing in *Northern Pac. R. Co. v. North Dakota,* 250 U. S. 135, 39 Sup. Ct. 502, inconsistent with this determination. As is said in *Rutherford v. U. P. R. Co.* 254 Fed. 880, and *Mardis v. Hines,* 258 Fed. 945, the director general was in exclusive possession of the railroads and exercised an exclusive control over them. But such exclusive possession and exclusive control was through the boards of directors, receivers, officers, and employees of the transportation systems, who by executive order were to continue the operation of the railroads in the usual and ordinary course of the business of common carriers. If a superintendent of the defendant company discharged one station agent and employed another in his place, which in the absence of any specific direction from the director general he no doubt had power and author-

ity to do, the person discharged was released from the service of the director general, and the person employed entered such service by reason of the fact that he was the agent and employee of the company, although he was at the same time and in a larger view the agent and employee of the director general. But he was such agent and employee of the director general because he was the agent and employee of the company. It is a matter of common knowledge that when the period of federal control ended, not only the physical properties, but the entire organizations, with comparatively insignificant exceptions, continued in the performance of their duties without any re-employment or new arrangement, a fact which strengthens the conclusion which we have reached, that during the period of federal control they remained the officers, agents, and employees of their respective companies. The trial court therefore erred in vacating the service of the summons and complaint.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

GEMERT, Appellant, vs. POOLER, Respondent.

March 11—April 6, 1920.

Game: Confiscation of automobile used in transporting game illegally killed: Constitutional law: Due process: Husband using wife's automobile without her knowledge or consent: Effect on forfeiture: Appeal: Bill of exceptions served after expiration of time to appeal.

1. On plaintiff's appeal, a bill of exceptions proposed and served by defendant after the statutory period for taking an appeal had expired, with no reason shown for the delay and against plaintiff's objection, should not have been allowed and will be stricken out.
2. Sub. (7), sec. 29.05, Stats., providing for the seizure and confiscation of property proved to have been used in violation of ch. 29, Stats., relative to game, though it makes no provision for notice and a hearing, does not deny due process of

law, in violation of sec. 1, amend. XIV, Const. U. S., because secs. 3294–3296 and 3312 authorize actions to recover forfeitures and to recover property forfeited, and also in view of the owner's right to resort to replevin.

3. A husband using his wife's automobile without her knowledge or permission for the purpose of transporting game killed illegally, was a trespasser.

4. It was not the legislative intent in sub. (7), sec. 29.05, Stats., in connection with other provisions of ch. 29, that personal property unlawfully used in violation of that chapter by one who is a trespasser or thief as to such property shall be subject to forfeiture as against the innocent owner.

APPEAL from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Reversed.*

The plaintiff, claiming as owner and entitled to the immediate possession of a certain Ford automobile seized by defendant as deputy conservation warden on September 8, 1917, commenced this action of replevin in the municipal court of Douglas county on September 12, 1917, and had judgment in her favor. Defendant appealed and a trial was had, a jury being waived, before the superior court of Douglas county on October 9, 1918.

The nature of the issues involved and the facts sufficiently appear from the findings of the trial court, which are substantially as follows:

Findings of fact.

(1) . . .

(2) That defendant was deputy conservation warden of the state of Wisconsin and that in seizing the automobile he was acting under and by virtue of instructions given to him by the conservation commission.

(3) That on September 6, 1917, plaintiff was the owner of the automobile in question and had the same in her possession in the city of Superior. That on or about said date John Gemert, the husband of the plaintiff, without her authority, knowledge, or permission, took the said automobile from the garage where the same was kept, and did on said day, with three other men, equip the same with guns and ammunition, and then proceeded to a point in said Douglas county for the purpose of hunting deer.

(4) That on said day John Gemert unlawfully killed a deer and deposited it in the automobile for the purpose of conveying it from such point to Superior.

(5) That such killing of the deer was unlawful and in violation of the game laws.

(6) That before John Gemert arrived in Superior with the car and the contraband deer he was apprehended by the defendant, taken before a justice of the peace, charged with an offense, pleaded guilty, was convicted, and paid a fine of $50 and costs.

(7) That thereafter and on the same day the automobile was returned by John Gemert to the garage in Superior and to the possession of the plaintiff.

(8) That the plaintiff had no knowledge or information of the taking or using by the said John Gemert of the automobile for such purposes or of his arrest and conviction or the payment of said fine until after the taking and seizure of the automobile by defendant as set forth in paragraph 9 of these findings, and never consented to such use thereof by said John Gemert.

(9) That on September 8, 1917, acting for and under the instructions of the conservation commission, the defendant took the automobile and kept the same until it was reclaimed by the plaintiff in November, 1917.

(10) Determined the value of the property and defendant's damages.

And conclusions of law as follows:

(1) That the defendant was justified in so taking and seizing the automobile by virtue of his office as deputy conservation warden of the state of Wisconsin.

(2) That in so seizing and holding the automobile he was justified by virtue of the instructions given him by the conservation commission, which instructions he was then executing.

(3) That the defendant is entitled to the possession of the automobile.

(4) That he is entitled to a judgment for its return, or the value thereof in case such return cannot be had, with six cents damages, costs and disbursements.

The plaintiff perfected her appeal to this court from that judgment in October and the record was received here in

November, 1919. The statutory time for taking such appeal terminated December 16, 1919. No bill of exceptions was signed or made a part of such record. March 1, 1920, defendant's attorney served a proposed bill of exceptions upon plaintiff's attorney, containing the testimony taken on the hearing of the action together with an exception by the defendant to a portion of the third finding of fact. Plaintiff's attorney objected to the allowance of such proposed bill of exceptions on the grounds that the time for appeal had expired and that no stipulation had been made for so extending the time for settling such bill of exceptions, and that no excuse was shown by defendant for such delay. The bill of exceptions was signed by the trial court March 6, 1920. To such signing the plaintiff duly filed written exceptions. A supplemental return embodying such proceedings was filed herein March 8, 1920.

The plaintiff's attorneys moved in this court to strike out such bill of exceptions for the same reasons that were interposed by way of objections before the trial court.

For the appellant the cause was submitted on the brief of *Dietrich & Dietrich* of Superior.

On behalf of the State Conservation Commission there was a brief by the *Attorney General* and *M. B. Olbrich*, deputy attorney general, as *amici curiæ*, and oral argument by *Mr. Olbrich*.

ESCHWEILER, J. Appellant's motion made here to strike out the bill of exceptions contained in the supplemental return must be granted. Such bill of exceptions was proposed, served, and signed after the statutory period for taking an appeal in this action had expired, and was so signed without the consent and over the objection of plaintiff and appellant and with no reason being shown for such delay. Under the circumstances disclosed the bill of exceptions should not have been allowed and cannot be considered. *Nelson v. A. H. Stange Co.* 140 Wis. 657, 663,

123 N. W. 152; *Bonnell v. C., St. P., M. & O. R. Co.* 158 Wis. 153, 147 N. W. 1046.

The conviction of plaintiff's husband, spoken of in the findings, was for violating sub. (1), sec. 29.43, Stats. This is part of ch. 29, Stats., providing for the control and regulation of wild animals. Said sub. (1), sec. 29.43, prohibits the transporting of any game during the closed season therefor, whether lawfully or unlawfully taken, and his sentence was pursuant to the penalties provided in sub. (d), sec. 29.63.

Defendant seized the automobile in question, and asserts a right to retain possession thereof pursuant to instructions of the conservation commission and under the final provisions of sub. (7), sec. 29.05, in the same ch. 29, and headed "Seizure and confiscation of property," and which said section reads as follows:

"They [viz. the state conservation commission and its deputies] shall seize and forthwith confiscate or destroy any apparatus, appliance, or device declared by any provision of this chapter to be a public nuisance; and shall seize and hold subject to the order of the commission, any other apparatus, appliance, or any vehicle, or device, which they shall have reason to believe is being used in violation of this chapter, and if it be proven that the same is, or has been within six months previous to such seizure, used in violation of this chapter the same shall be confiscated."

The property here in question is not claimed by defendant to be included with the list of articles declared by sec. 29.03, Stats., being the action evidently referred to in the first clause of sub. (7), sec. 29.05, *supra,* to be nuisances, such as nets, traps, set-guns, boats, or decoys, or other specified articles used in prohibited hunting and fishing.

The appellant urges that the provisions in question here of sub. (7), sec. 29.05, so relied upon by defendant, are unconstitutional, for the reason that such section and the chapter in which it is found make no provision for a hearing upon notice to the owner to determine whether the property

in question was unlawfully used or properly subject to forfeiture, and for that reason such provisions are in violation of that part of sec. 1, art. XIV, of the amendments to the constitution of the United States, which reads as follows: "Nor shall any state deprive any person of life, liberty, or property, without due process of law." There is no express provision in sec. 29.05, nor in the chapter in which the same is found, for any form of legal proceeding to ultimately declare property, under circumstances such as those disclosed in this case, lawfully forfeited to the state and the owner's right of possession thereto at an end; yet by ch. 142, Stats., entitled "The collection of forfeitures," and by sec. 3294 therein contained, it is provided that in all cases not otherwise specially provided by law, where a forfeiture shall be incurred by any person and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action, and that the word "forfeiture" as used in that chapter shall include any penalty in money or goods other than a fine. Sec. 3295 provides for the form of such action, and that it shall be brought in the name of the state of Wisconsin; and by sec. 3296 provision is made for a simple form of complaint in such form of action. And further provision is made by sec. 3312 of the same chapter that whenever, pursuant to law, any personal property shall be forfeited to the state or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in the circuit court.

Construing the effect of the provisions in ch. 142, Stats., in connection with ch. 29, it is apparent that a way is thus provided for legal proceedings upon due notice to the parties concerned for the determination of the questions as to whether or not the property involved has become forfeited and as to whether or not the former owner's title has been lost by reason of any such forfeiture. It is immaterial here

to determine under just which one of the provisions of ch. 142 proceedings should be brought as to such property as is here involved under the circumstances disclosed. It is sufficient that the law of this state does afford legal proceedings in which the rights of parties to the property involved can be determined upon the usual form of notice.

The law of this state does provide a method to be followed upon notice to the parties concerned before a person's property situated as was plaintiff's here could be legally forfeited or her title destroyed, and so providing there is due process of law. *Twining v. New Jersey,* 211 U. S. 78, 111, 29 Sup. Ct. 14; *Standard Oil Co. v. Missouri,* 224 U. S. 270, 287, 32 Sup. Ct. 406; *Miedreich v. Lauenstein,* 232 U. S. 236, 245, 246, 34 Sup. Ct. 309.

The remedy she resorted to here, of replevin, afforded her as well as defendant a further legal method of determining their respective rights. *Lawton v. Steele,* 152 U. S. 133, 142, 14 Sup. Ct. 499; *Bittenhaus v. Johnston,* 92 Wis. 588, 598, 66 N. W. 805.

Taking the findings in this case, as we must, as verities, we construe them, and particularly the third finding above quoted, to mean in effect that the automobile, when put by plaintiff's husband to its unlawful use, was so taken and used without plaintiff's knowledge or permission, and this requires as a necessary conclusion from such construction that as to her, in this particular instance, the automobile was used by one who was a trespasser.

Considerable conflict is found in the authorities, which we do not deem necessary to cite or discuss, on the question as to how far a claim of forfeiture of the nature herein involved can be successfully defended against by the real owner of the property, the possession of which at the time of the doing of the act upon which the forfeiture is predicated was in one who was as to such real owner a trespasser or a thief.

We hold in this case that it was not the legislative intent

in sub. (7), sec. 29.05, in connection with the other provisions of ch. 29, that the personal property of an innocent holder, which property is being unlawfully used in violation of the provisions of such section or chapter by one who is a trespasser or thief as to such property, shall be subject to forfeiture and the property rights of the innocent owner taken away. *State v. Davis* (Utah) 184 Pac. 161; *Moody v. McKinney,* 73 S. C. 438, 53 S. E. 543; *Smith v. Spencer-Dowler Co.* (Ga.) 100 S. E. 651; *U. S. v. Two Gallons of Whisky,* 213 Fed. 986.

This renders it unnecessary to discuss or determine any other questions argued.

It follows therefrom that plaintiff was entitled under the findings of fact to a judgment in her favor for the return of the automobile.

By the Court.—Appellant's motion to strike out the bill of exceptions is granted, and the judgment reversed, with directions to enter judgment in plaintiff's favor.

LEEMANS, Respondent, vs. HINES, Director General of Railroads, Appellant.

March 11—April 6, 1920.

Railroads: Action for personal injury: Party defendant: Director general of railroads: General Order No. 50: Question first raised after verdict: Excessive damages.

1. A judgment for the plaintiff in an action against the present director general of railroads in accordance with General Order No. 50, issued by his predecessor, will not be reversed on his appeal, though the order was contrary to sec. 10 of the railroad control act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), authorizing suits against railroads while under federal control, where the director general defended the action on the merits and first raised the question by motion for judgment notwithstanding the verdict, especially since the decisions as to the validity of the order are conflicting and the question has not been determined by the United States supreme court.

2. In an action for personal injuries sustained by plaintiff, a verdict for $3,000, though probably excessive for a simple fracture of the ulna followed by complete recovery, is not excessive where there was testimony which the jury had a right to believe that there were two fractures and that the motion of the forearm is permanently limited, having about sixty-five per cent. normal motion.

APPEAL from a judgment of the circuit court for Douglas county: W. R. FOLEY, Circuit Judge. *Affirmed.*

This action was brought against the defendant, *Walker D. Hines,* as director general of railroads, who as such was operating the Great Northern Railway Company at the time of the accident, to recover damages for personal injuries sustained by plaintiff, who was at the time an employee of the Pittsburgh Coal Company at Superior, Wisconsin, said injuries being caused by the employees of the defendant operating one of the Great Northern Railway Company's switch engines, in backing a string of cars against the one in which plaintiff was working.

The jury returned a special verdict, upon which plaintiff was entitled to recover, and assessed his damages at the sum of $3,000. Thereafter, and at the same term, the defendant moved the court for judgment in his favor dismissing the action, for judgment notwithstanding the verdict and to set aside the same, for the reason, among others, that under sec. 10 of the act of Congress of the United States of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), taking over the management, control, and operation of the railroads, this action cannot be brought, instituted, or maintained against this defendant, and can only be brought, instituted, or maintained, if at all, against the Great Northern Railway Company, the owner of the property then operated by the defendant herein. This motion was overruled. Judgment was entered in favor of the plaintiff and against the defendant in the sum of $3,000, from which judgment defendant appealed.

For the appellant there was a brief by *J. A. Murphy* and *H. G. Pickering,* both of Superior, and oral argument by *Mr. Pickering.*

For the respondent there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

OWEN, J. The principal question argued upon this appeal is whether this action can be maintained against the director general of railroads. In *Franke v. C. & N. W. R. Co.* 170 Wis. 71, 173 N. W. 701, the action was brought against the railway company. The defendant moved for an order dismissing the action as to the defendant railway company and substituting therefor as defendant the director general of railroads. The question there was whether General Order No. 50 issued by William G. McAdoo, director general of railroads, on October 28, 1918, supplanted sec. 10 of the federal control act (40 U. S. Stats. at Large, 451, ch. 25) so that litigants were by that order deprived of the right to bring actions at law against the railway companies, as is plainly provided by sec. 10 of the act. So much of the act and the order as was material to that case, and as is material here, is set out in the report of the *Franke Case* and will not be restated here. This court held that the right conferred upon litigants by sec. 10 of the federal control act was not wiped out by General Order No. 50, and the order of the court below granting the motion to dismiss the action as to the railroad company was overruled. That case declares the attitude of this court upon that question and we have no disposition to recede from the position there taken.

This record, however, presents a different question, which may be stated thus: In view of the fact that the director general of railroads, by General Order No. 50, ordered that actions such as this shall be brought against the director general of railroads; that this action was brought in compliance with the order; that he answered, appeared, and de-

fended the action and raised no objection that it was not properly brought against him, until after the rendition of the verdict, should this court upon this appeal reverse the judgment and order the dismissal of the action? While the position of this court is as stated in the *Franke Case,* it is to be remarked that judicial authority, so far as expressed, is in direct conflict upon the question of whether the action is properly maintainable against the railroad company or the director general of railroads. The ultimate decision of this question rests with the supreme court of the United States, and it has not yet spoken thereon. At least two federal courts (*Mardis v. Hines,* 258 Fed. 945; *Haubert v. B. & O. R. Co.* 259 Fed. 361), and perhaps others, have held that the action is properly maintainable against the director general. In this mooted state of the law the plaintiff elected to bring his action against the director general of railroads. He did this pursuant to an invitation by the director general himself, and the latter raised no objection to the right of the plaintiff so to do until after the rendition of the verdict, but went into court and defended the case upon its merits. Plaintiff has a judgment which the supreme court of the United States may declare to be valid. Under the circumstances we do not think any intermediate authority such as this court should deprive him of his judgment when the question of its validity is of such doubtful character.

The situation presents a technical rather than a practical difficulty. Whether the action be properly maintainable against the one or the other, the federal statute plainly contemplates that damages of this nature are a part of the operating expense of the railroads while under federal control, and that judgments of this character are to be paid out of the revenues derived from their operation. There has been a judicial determination, in form at least, of liability and the amount of damages. This should suffice to satisfy the director general of the *bona fides* of the claim and his obligation to pay the same out of the funds under

his control. It was within his discretion to settle the claim without suit. The judgment having been rendered in an action instituted and prosecuted in strict compliance with his own order, it is not to be assumed that he will repudiate it. We think the judgment should stand.

It is urged by appellant that the damages are excessive. His argument is based upon the assumption that the injuries consisted only of a simple fracture of the ulna of the arm and a complete recovery has been had. Among others, the following cases are cited to the point that the verdict is excessive for such an injury: *Meracle v. Down,* 64 Wis. 323, 25 N. W. 412; *Collins v. Janesville,* 107 Wis. 436, 83 N. W. 695; *Rueping v. C. & N. W. R. Co.* 116 Wis. 625, 93 N. W. 843; *Otto v. M. N. R. Co.* 148 Wis. 54, 134 N. W. 157. These cases, and others cited, probably support the contention that $3,000 are excessive damages for a simple fracture of the ulna followed by complete recovery. The argument of appellant, however, entirely ignores the testimony of plaintiff's medical witness to the effect that there were two fractures, one at about the middle of the shaft and the other at the head of the ulna, and that the motion of the forearm is limited, having but about sixty-five per cent. of normal motion. Dr. Lohmiller testified: "I figure that his arm from the elbow up to the shoulder is about a sixty-five per cent. arm. That is, he can't button his collar or can't feel the back of his head. In my opinion there will be no improvement in the deformity." The jury had a right to believe this evidence, and if the facts were as testified to by Dr. Lohmiller the damages were not excessive.

By the Court.—Judgment affirmed.

STATE EX REL. CITY OF SUPERIOR, Respondent, vs. DULUTH & SUPERIOR BRIDGE COMPANY, Appellant.

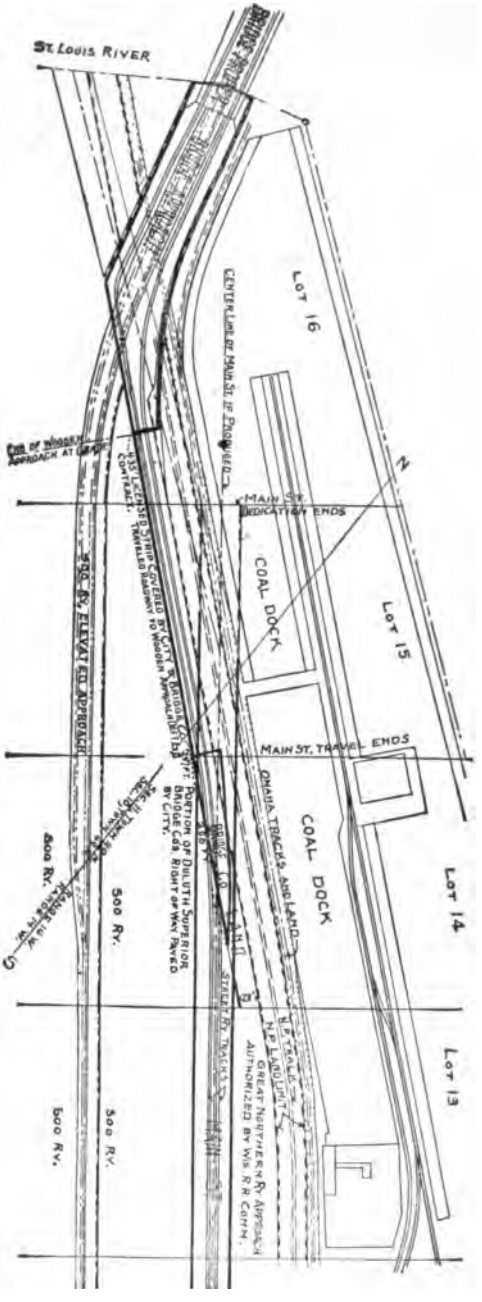
March 12—April 6, 1920.

Municipal corporations: Limits of power to make contracts: Authority to acquire easements for street purposes: Mandamus to compel bridge company to repair approach to bridge.

1. A contract by which a bridge company granted to the city of Superior an easement for a street over a strip of land leading from a public street to the approach of its bridge, and which obligated the city to maintain the roadway over the land, was beyond the powers conferred on the city and void, and gave the city no easement, where the strip was not dedicated as a street and the city did not lay out a street as provided in its charter.
2. Agents, officers, or even the city council of a municipal corporation cannot bind it by the assumption of powers not granted to it in express words or necessarily and fully implied in or incidental to the powers expressly granted, or essential and indispensable to its declared objects and purposes.
3. Where the bridge company's refusal to repair the roadway was based on the void contract imposing such duty on the city, and it does not appear that the bridge company would refuse to keep the roadway in repair if not relieved of such duty by the contract, there was no such refusal to perform its legal obligations as entitled the city to compel performance by *mandamus.*
4. *Mandamus* will not lie to compel the company to pave and maintain the roadway in accordance with the city's demands, as the company might adopt a sufficient and appropriate manner of maintaining the roadway wholly different from that sought by the city.

APPEAL from a judgment of the circuit court for Douglas county: W. R. FOLEY, Circuit Judge. *Reversed.*

This action was brought by the city of *Superior* against the *Duluth & Superior Bridge Company* for a writ of *mandamus* to compel the defendant to pave a certain piece or strip of land described as the driveway between the bridge approach and Main street, Connors Point, in the city of *Superior,* and to pay the cost thereof. A map of the land concerned is attached for reference.


LOT 16
LOT 15
LOT 14
LOT 13
COAL DOCK
COAL DOCK
MAIN ST. TRAVEL ENDS
MAIN ST. DEDICATION ENDS
CENTER LINE OF MAIN ST. IF PROJECTED
ST. LOUIS RIVER
500 RY.
500 RY.
500 RY.
500 RY.
OMAHA TRACKS AND LAND
GREAT NORTHERN RY. APPROACH AUTHORIZED BY WIS. R.R. COMM.
N.P. LAND UNIT
U.P. TRACKS
STREET RY. TRACKS
PORTION OF DULUTH SUPERIOR BRIDGE CO. RIGHT OF WAY PAVED BY CITY.
CITY LEASES STRIP COVERED BY CITY'S BRIDGE CONTRACT. TRAVELED ROADWAY TO WOODEN APPROACH
990 RY. ELEVATED APPROACH
N

The petition for the writ alleges, in substance, that the *Duluth & Superior Bridge Company* was organized under the laws of this state to construct a bridge and approaches thereto over the St. Louis river between Wisconsin and Minnesota, and to operate the same as a means of traffic and communication by persons and traffic on foot, and by carriage, team, auto, street cars and steam cars; that in 1904 the company secured an act to be passed by Congress which authorized said company and its successors in interest to construct and maintain and operate a bridge and approaches thereto over the St. Louis river between the states of Wisconsin and Minnesota, extending from the northerly end of Connors Point, in Wisconsin, to Rice's Point, opposite, in the state of Minnesota; that the land on Connors Point in the state of Wisconsin and on Rice's Point in the state of Minnesota, in and for a long time prior to said time, was platted, and there was a public street and highway built, laid out, and extending lengthwise of said point; that the act of Congress authorized the *Bridge Company* to construct and maintain the bridge from such points between Connors and Rice's Point as the *Bridge Company* might select and determine; that, acting under and by authority of this act of Congress, the *Bridge Company* built and constructed a bridge and approaches thereto from a point selected by it on Rice's Point to a point selected by it on Connors Point, and through and by virtue of condemnation proceedings acquired land to approach the bridge and connecting it with Main street on Connors Point, at a point some distance from the end of Connors Point, and from the end of said platted street, and improved such bridge and approach thereto connecting the same with said Main street on Connors Point; that thereafter said bridge and approaches thereto, including the strip of land so condemned over and through private property from the end of the bridge structure to and connecting with Main street at the point selected by the *Bridge Company,* have been largely used for traffic for and by dif-

ferent means of traffic by the people as a highway between the city of *Superior* and the city of Duluth; that the bridge and approaches thereto, including the connecting link with Main street on Connors Point, have been so used by the *Bridge Company* as a toll bridge, and said company has charged and collected toll and consideration for all persons and traffic across and over the same, and still so charges and will continue to charge such toll, and that said means of traffic and transportation are of large benefit and pecuniary advantage to the city of *Superior* and the inhabitants thereof.

The petition further alleges that said driveway connecting Main street with the bridge, which was so condemned for public travel, is owned by the *Bridge Company,* is narrow and has located thereon street-car tracks, and is used for public travel by the public on foot, by automobile, teams, and street car, and other methods and means of transportation, and is the only course of travel between the cities of *Superior* and Duluth; that the approach between Main street and said bridge structure was paved or improved with gravel pavement, which has become so worn and out of repair that it is almost impossible and dangerous for use of the public; that it is the duty of the *Bridge Company* to pave and make safe the approach and connection with Main street; that the *Bridge Company* has failed and refused to perform this duty; that the city of *Superior* has no authority to expend public funds for the improvement or maintenance of the bridge or approaches thereto, including said driveway between Main street and the bridge proper, which is private property and is owned by the *Bridge Company.* The petitioner prays for a peremptory writ of *mandamus* commanding the *Duluth & Superior Bridge Company* to pave, improve, and otherwise maintain this roadway.

The return of the defendant sets up, among other things, a contract made in 1904 between the city and the *Bridge Company* whereby the *Bridge Company* agreed to furnish

the gravel for paving this strip or driveway and also Main street up to the end of this driveway, and the city agreed to spread the gravel and to exempt the *Bridge Company* from street improvement assessments.

The *Bridge Company* claims that such contract requires the city forever to maintain, including repaving when necessary, this driveway to the bridge without cost to the *Bridge Company,* defendant, however, reserving the right to terminate such use at any time by giving ninety days' notice. The return further alleges that since November, 1904, the city of *Superior* has, pursuant to the rights thus granted to it by defendant over its land, maintained said street and tract of land for public travel, and has improved the same at various times; that in 1918 the city commenced proceedings to pave and did pave Main street on Connors Point, the entire distance from Lamborn avenue west, not only to the junction between the licensed strip, but also for a distance of 256 feet over and upon the land of the *Bridge Company,* without assessing the cost thereof to the *Bridge Company;* that the city instituted and has now pending a regular statutory proceeding for the paving of the entire balance of the licensed strip and charging the cost thereof to the benefited property owners. The return also claims that under the act of Congress authorizing the construction of the bridge it is provided that the War Department especially reserved the right at any time to require or order any change in the bridge, structure, or approaches at the expense of the owner thereof, and that any litigation concerning any question arising out of the charter or the operation of the bridge should be tried before the circuit court of the United States in whose jurisdiction any part of the bridge is located; that this court has no jurisdiction to try and determine any question affecting the construction, repair, maintenance, or improvement of the approach or approaches, and because of this the action should be dismissed.

The case was tried before the court. The court found

that it is the duty of the defendant *Bridge Company* to maintain the traveled roadway on this strip of land from Main street to its bridge in a proper state of repair for public travel; that the contract entered into between the city and the defendant *Bridge Company* in 1904 is null and void in so far as it attempted to obligate the city to maintain the roadway over the strip of land, as such duty rested on the *Bridge Company* and was beyond the power of the city authorities to assume by contract; that the city had no authority to improve this strip at the expense of the owners of the abutting property or to expend public moneys therefor, and that the proceedings instituted for such purpose are void. Judgment was entered awarding a peremptory writ requiring the *Bridge Company* to pave and maintain such driveway. From this judgment the defendant appeals.

For the appellant there were briefs by *J. A. Murphy* and *H. G. Pickering,* both of Superior, and oral argument by *Mr. Pickering.*

For the respondent there was a brief by *R. I. Tipton* and *T. L. McIntosh,* both of Superior, and oral argument by *Mr. McIntosh.*

SIEBECKER, J. The principal issues raised in this action turn on the effect of the contract between the city of *Superior* and the *Bridge Company.* As appears by the above statement of the facts involved in this litigation, the alleged contract was made to relieve the *Bridge Company* from maintaining the driveway between the points where the approach contacts at grade with the strip in question and the point where it intersects Main street, and to exempt the *Bridge Company's* property abutting on the strip from special street improvement assessments.

We think the appellant correctly claims that the contract as made, under the circumstances then existing, clearly indicates that the parties intended that the city was to acquire a right in the nature of an easement for a street over this

strip for the use of the public. The city charter of the city of *Superior* confers on the city the usual rights of eminent domain granted cities for acquiring land for the purpose of laying out streets and for other city purposes. The charter provisions and those prescribing how the public streets of the city are to be improved limit the city council to the methods provided in the charter for laying out, establishing, and improving the city streets. Concededly no attempt was here made to lay out a street over the strip in question, nor was there a dedication by the *Bridge Company* and acceptance thereof as a public street by the city. The arrangements between the company and the city culminating in this contract were not within the powers conferred on the city, and hence were ineffective and void.

As declared in *Becker v. La Crosse,* 99 Wis. 414, 417, 75 N. W. 84, "It is also a rule of law . . . universal in its application, that the agents, officers, or even the city council, of a municipal corporation cannot bind the corporation by the assumption of powers . . . except within the limits . . . stated." These limits to the exercise of municipal powers are: "First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable."

In *Trester v. Sheboygan,* 87 Wis. 496, 58 N. W. 747, it was determined that "A city has no power to purchase an easement for street purposes, under a charter which, besides the usual provision for the condemnation of land for public grounds, streets, etc.," also confers power to lease, purchase, and hold real property for city purposes. See, also, *State ex rel. Mueller v. Thompson,* 149 Wis. 488, 137 N. W. 20; *Superior v. Roemer,* 154 Wis. 345, 141 N. W. 250; *State ex rel. St. Paul v. Minn. T. R. Co.* 80 Minn. 108, 83 N. W. 32. The *Trester Case* also holds: "The city council, having absolutely no power originally to make the

contract of purchase, cannot ratify it by subsequent acts." Cases cited.

It follows from the foregoing that the contract is void, that the city has no easement over the strip in question to use and maintain it as a street, and that it is without power to regulate and control its maintenance and improvement as a public street of the city. No question is raised concerning the *Bridge Company's* power to condemn and use the strip in question as a roadway from Main street to its bridge. Assuming that the *Bridge Company* legally acquired the strip for the purposes of a roadway, the question arises: Is the relator entitled to maintain this action to compel the *Bridge Company* to make the improvement specified in the petition for the writ of *mandamus?*

It is manifest from the pleading and the issues litigated that the defense to relator's complaint rests on the assumed validity of the contract in question and that the *Bridge Company* has based its refusal to keep the roadway over the strip in a sufficient state of repair solely upon the ground that it is a public street. The facts of the case disclose nothing to indicate that the *Bridge Company* will refuse to keep it in proper condition for the use of the public in connection with the public travel over the bridge if it is not relieved of such duty by the contract. Under the facts and circumstances presented there is no showing that the defendant refuses to perform any of its legal obligations respecting the roadway over the strip which entitled relator to proceed by *mandamus* to compel it to perform its legal duties in this matter.

The trial court held that relator is entitled to the writ to compel defendant to pave and maintain the roadway in accordance with the demands of the city. The infirmity of this position is that the defendant's legal duty to repair and maintain this roadway cannot be enforced in the particular manner the relator demands. The defendant may adopt a sufficient and appropriate manner of maintaining the road-

way wholly different from that sought by the city. *State ex rel. Redenius v. Waggenson,* 140 Wis. 265, 122 N. W. 726. It is considered that the facts do not present a case for relief by the extraordinary remedy of *mandamus.*

It is claimed by defendant that the bridge in question is a railroad bridge and that the improvement of the strip here involved is a subject wholly cognizable by the railroad commission of this state under sec. 1797—12*k,* Stats., except so far as Congress has reserved power of control in the War Department. If this bridge is in fact a railroad bridge, as contended by defendant, it may be of the class defined by the provisions of sec. 1325*n* and be subject to the obligation and penalties prescribed by this section. The questions thus arising under secs. 1797—12*k* and 1325*n* are not necessarily involved in a complete determination of the issues presented on this appeal and we therefore shall not express any opinion upon them.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to quash the writ.

ANSTEE, Respondent, vs. MONROE LIGHT & FUEL COMPANY, Appellant.

March 12—April 6, 1920.

Nuisance: Industrial waste from gas plant: Infiltration of soil: Pollution of well: Action by landowner to abate nuisance and for damages: Parties who may maintain action: Assessment of damages.

1. An owner of land near a gas plant may bring an action for damages from infiltration of the soil and the pollution of his well and for an abatement of the nuisance, such damages being special to such owner, notwithstanding other property owners in the vicinity also sustained damages.
2. It is not essential to the maintenance of an action for damages sustained from a nuisance and for abatement of the nuisance that plaintiff alone should be affected by the nuisance, it

being sufficient if he belongs to a class specially affected by it, and whose damages differ, not only in degree but also in kind, from those of the public generally.

3. Where plaintiff's house was located about 1,200 feet from a gas plant and the smoke and the odor affected the comfort, if not the health, of his family, his damage was special and entitled him to maintain an action for damages and for abatement of the nuisance.
4. An award of $1,200 for infiltration of the soil and $100 for the pollution of plaintiff's well by industrial waste from a gas plant is not excessive.
5. Since the court directed the abatement of the nuisance and its recurrence is unlikely, damages may properly be assessed for future as well as present injury to the soil and well.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action to abate a nuisance and to recover damages caused by the nuisance. The defendant operates a gas plant in the city of Monroe, and plaintiff, whose premises, consisting of about twenty acres, are situated a short distance therefrom and below the gas plant, alleges that he has sustained damage by reason of the percolation through his soil of large quantities of industrial waste, consisting of a tarry, oily liquid, which defendant has deposited in a section of an abandoned sewer upon its premises and upon the ground, causing plaintiff's well to become unfit for domestic or other use, and polluting the soil to such an extent that disagreeable odors arise therefrom and the fertility thereof is greatly impaired; also that plaintiff has suffered great annoyance and some damage from smoke from defendant's smokestack because not high enough and not equipped with efficient smoke-consuming devices.

The court found for plaintiff as to all these sources of damages and assessed damages for general soil infiltration at $1,200; for pollution of the well at $100, and for excessive smoke at $10, and perpetually enjoined defendant from further deposits of industrial waste upon its premises in such a manner as to cause further pollution of plaintiff's

soil, and a discontinuance of the smoke nuisance after such reasonable time as it might require defendant to make the necessary alterations in its smokestack and for installing modern improved methods for minimizing and abating the smoke nuisance. From a judgment entered accordingly the defendant appealed.

For the appellant there was a brief by *Jeffris, Mouat, Oestreich, Avery & Wood* of Janesville, and oral argument by *O. A. Oestreich.*

J. L. Sherron of Monroe, for the respondent.

VINJE, J. As far as the damages resulting from an infiltration of the soil and from a pollution of the well are concerned, they are special to the plaintiff to the extent that he may maintain an action therefor and for an abatement of the nuisance. *Clark v. C. & N. W. R. Co.* 70 Wis. 593, 36 N. W. 326. It is true that the court found that some twenty other wells in the vicinity were more or less affected by the pollution of the soil; but all such wells were on premises adjacent to Thunder river, the small stream that flowed past the gas plant and through a portion of plaintiff's premises. The industrial waste was carried down the stream and affected the soil on both sides thereof for a considerable distance. This fact made the premises of those affected stand in a different relation to the nuisance than those of the rest of the public. It is not essential to a maintenance of the action that plaintiff alone should be affected by the nuisance. It is sufficient that he belongs to a class specially affected by it and whose damages differ not only in degree but also in kind from those of the public generally. *Clark v. C. & N. W. R. Co.* 70 Wis. 593, 36 N. W. 326; *Tilly v. Mitchell & Lewis Co.* 121 Wis. 1, 98 N. W. 968; *Baier v. Schermerhorn,* 96 Wis. 372, 71 N. W. 600; *Mahler v. Brumder,* 92 Wis. 477, 66 N. W. 502; *Stone v. Oconomowoc,* 71 Wis. 155, 36 N. W. 829.

As to the smoke nuisance, the evidence shows that plaint-

iff's house was located about 1,200 feet from the gas plant and that frequently the smoke was so thick and the odor from it so bad that it affected the comfort if not the health of plaintiff and his family. Under the principles above stated, this damage was also special to plaintiff because of his nearness to the plant.

Considerable effort was spent by defendant in contending that the assessments of $1,200 damages to the soil and of $100 to the well are excessive. We have carefully gone over the evidence with the result that we find it sustains the assessments. The injury to the soil affected its productiveness and, while not permanent in its nature, was likely to endure for many years. The testimony of a number of apparently disinterested and competent witnesses was to the effect that the market value of the premises was reduced several thousand dollars from the soil infiltration alone, and the well was shown to be wholly unfit for domestic use by reason of pollution and that it would take a long time before the purity of its water would be restored. We find no basis in the evidence for reducing the amount of damages found by the court.

Since no further recurrence of the nuisance is likely to take place, the court properly assessed damages for future as well as past injury to soil and well occasioned by the acts of the defendant complained of. In this way, and in this way only, could plaintiff be made whole in one action for the loss sustained by him by reason of the acts of nuisance already committed by the defendant.

By the Court.—Judgment affirmed.

KASPAR, Appellant, vs. MURRAY, Respondent.

March 12—April 6, 1920.

Witnesses: Competency: Husband and wife: Privileged communications: Impeachment of one spouse by the other.

Statements by a husband to his wife, no one else being present, are privileged and confidential communications, and cannot be testified to by her, without his consent, to impeach him as a witness, even in an action to which neither is a party or is interested.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action for assault and battery with a jury verdict in favor of the defendant.

One Carl Gubine was sworn for the defendant and gave material testimony about the transaction in question. On cross-examination he was asked as to whether he had made certain statements to any persons, which would have tended to contradict and impeach his direct testimony, and he denied having done so.

The plaintiff then called as a witness Gubine's wife and proposed to examine her as to alleged statements made to her by Gubine on the morning after the assault. This was objected to as incompetent, irrelevant, and immaterial and as calling for a confidential communication between husband and wife, and inadmissible under sec. 4072, Stats.

Gubine was recalled by plaintiff's counsel and then said that he would not consent to his wife testifying. The court then refused to permit Mrs. Gubine to testify, it appearing that no one else than her husband and herself was present at the time of such alleged conversations.

Upon judgment being rendered in favor of the defendant the plaintiff has appealed.

For the appellant the cause was submitted on the brief of *Raymond J. Cannon* of Milwaukee.

For the respondent there was a brief by *Clark & Lueck* of Beaver Dam, and oral argument by *Royal F. Clark.*

ESCHWEILER, J. The only error alleged in this appeal is upon the ruling of the trial court in refusing to permit plaintiff to examine the wife of defendant's witness Gubine as to alleged statements made by him to her relative to the transaction in question.

The testimony sought to be elicited would tend to directly impeach the witness and show that he had testified falsely on material points in his direct examination as a witness for the defendant. Statements of such a nature made by one spouse to another, no one else being present, and during coverture, are private and confidential communications between husband and wife. Being such, they are subject to the privilege of secrecy which public policy has deemed best to throw around such communications, and without the consent of the other the one spouse cannot be permitted to divulge them. The privilege exists just as well when the testimony is sought in a collateral suit as here, where neither husband nor wife is a party or interested in the litigation, as where they or either of them are or is so interested. *Hopkins v. Grimshaw,* 165 U. S. 342, 351, 17 Sup. Ct. 401; *Stein v. Bowman,* 13 Pet. (38 U. S.) 209, 222; *Mahlstedt v. Ideal L. Co.* 271 Ill. 154, 166, 110 N. E. 795; *Williams v. Betts* (Del.) 98 Atl. 371; *Moore v. Wingate,* 53 Mo. 398, 410; *McCormick v. State,* 135 Tenn. 218, 186 S. W. 95; 6 Ency. of Ev. 897; 40 Cyc. 2360.

A statutory provision declaring that neither husband nor wife shall testify as to private conversations with each other has been declared to be but the restating of this common-law principle (*Sampson v. Sampson,* 223 Mass. 451, 458, 112 N. E. 84), and to be applicable even when the testimony is desired by a third person. *Comm. v. Spencer,* 212 Mass. 438, 451, 99 N. E. 266.

This court has strictly upheld, wherever the question has arisen, full recognition to similar privileges such as are found between physician and patient or lawyer and client. *Casson v. Schoenfeld,* 166 Wis. 401, 410, 166 N. W. 23; *Herman v. Schlesinger,* 114 Wis. 382, 391, 90 N. W. 460. We see no reason here for wavering from such course.

This disposition of the case makes it unnecessary to consider sec. 4072, Stats.

By the Court.—Judgment affirmed.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

March 13—April 6, 1920.

Public utilities: Action to set aside order of railroad commission: Rates: Test as to reasonableness: Urban and suburban railways operated as one system.

Where a public utility operated street railways and suburban railways as one system, the reasonableness of the rates fixed by the railroad commission as to the operation of the suburban line is not affected by the fact that such line will be operated at a loss under the rates so fixed, the test of reasonableness being the effect upon the system as a whole.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an order of the *Railroad Commission* requiring the plaintiff to continue the operation of one of its suburban lines because it is unreasonable in that it requires plaintiff to operate it at a loss based upon the rates fixed by the *Commission* and received from the operation of such line. The *Commission* entered a general demurrer to the complaint, and from an order sustaining it the plaintiff appealed.

The cause was submitted for the appellant on the brief of *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and for the respondent on that of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

VINJE, J. The complaint shows that the plaintiff operates a system of urban and suburban railways in and about the city of Milwaukee and its suburbs, and it alleges that the order complained of is unreasonable because its suburban system for a long time past has been operated at a loss.

The question raised by the demurrer is, Does the complaint state a cause of action without alleging that its entire system will be operated at a loss? The trial court answered it in the negative on the ground that the true test is not the effect of the order upon a single line or upon a part of a system but upon the whole system, and cited *Puget Sound T., L. & P. Co. v. Reynolds,* 244 U. S. 574, 581, 37 Sup. Ct. 705, 61 L. Ed. 1325, 1330, to sustain the ruling. It appears that for the purpose of fixing rates the *Railroad Commission* has treated the urban and suburban lines as one system and plaintiff takes no exception to such treatment, but suggests that it may run counter to the decision of this court in *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83, 97, 74 N. W. 538, where it was held that a street railway upon a country highway constituted an additional burden thereon requiring condemnation under ch. 175, Laws 1897, and that the corporate limits of a city marked the boundary where such additional burden began. It is not perceived how this decision affects the *Commission's* treatment of plaintiff's system of street railways as constituting one system for rate-making purposes; nor has our attention been called to any other case in this court running counter to the *Commission's* view.

The general rule of law is that the true test of the reasonableness of a rate is its effect upon the entire system operated by the public utility, and not whether a particular part

thereof is operated at a profit or loss under the prescribed rate. *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 485; *Puget Sound T., L. & P. Co. v. Reynolds*, 244 U. S. 574, 37 Sup. Ct. 705; *Groesbeck v. D., S. S. & A. R. Co.* 250 U. S. 607, 40 Sup. Ct. 38; *People v. McCall*, 245 U. S. 345, 38 Sup. Ct. 122; *Trenton v. Trenton & M. Co. T. Corp.* 92 N. J. Law, 61, 105 Atl. 136.

The case of *Brooks-Scanlon Co. v. Railroad Comm.* 251 U. S. 396, 40 Sup. Ct. 183, relied upon by plaintiff, differs radically from the case at bar. There the plaintiff was engaged in a private lumber business and also in operating a public railroad, and it was held that the profits made in the private lumber business could not be taken into account in determining whether the railroad was run at a loss. Here we have no such situation. Plaintiff's street railways are a public utility run as a single system. It is not engaged in two separate businesses, one private and the other public, both of which are sought to be included in a consideration of the profits of the latter, as in the *Brooks-Scanlon Case*. The trial court properly held that the complaint failed to state a cause of action.

By the Court.—Order affirmed.

STATE EX REL. CITY OF SHAWANO, Appellant, vs. ENGEL and others, Town Supervisors, Respondents.

March 13—April 6, 1920.

Municipal corporations: City operating under the general charter law: Description of boundaries as part of charter: Annexation of territory by legislature as amendment of charter: Quasi-municipal corporations: Statutes: Constitutional law: Special legislation.

1. A city of the fourth class under the general charter law (secs. 925—1 to 925—169, Stats.) exists and functions under a "charter," in the ordinary meaning of that term, and within

the meaning of sec. 31, art. IV, Const., prohibiting the enactment of any special or private law incorporating any city, town, or village, or amending the charter thereof.

2. The description of the territory included within the corporate limits of a city of the fourth class existing under the general charter law is a part of its charter.
3. Ch. 516, Laws 1919, providing for annexation of a portion of the town of Richmond to the city of Shawano, a city of the fourth class existing under the general charter law, is violative of sub. 9, sec. 31, art. IV, Const., prohibiting special legislation amending the charter of a city, such city functioning under a "charter" within such constitutional provision, and a change in the territory thereof being an amendment of its charter.
4. There is a substantial difference between *quasi*-municipal corporations, such as towns and counties (each of which is declared to be a body corporate by secs. 773 and 650, Stats., respectively), and municipal corporations proper, such as cities and villages; and decisions of this court in relation to changing the boundaries of towns and counties are not applicable to a city.
5. Sec. 32, art. IV, Const. (providing for general laws for the transaction of business prohibited by sub. 9, sec. 31, art. IV), and art. XI, Const. (relating to municipal corporations), do not sustain the enactment of ch. 516, Laws 1919, in view of ch. 183, Laws 1917, and the plain prohibitory provisions of sec. 31, art. IV, Const.

APPEAL from a judgment of the circuit court for Shawano county: A. H. REID, Judge. *Affirmed.*

The relator and appellant, the city of *Shawano,* a city of the fourth class under the general charter law, sought to compel the defendants, supervisors of the town of Richmond, to meet its city council to provide a method of apportioning the assets and liabilities of the said town to the said city under the provisions of ch. 516, Laws 1919, by which act it was alleged a certain portion of said town had become annexed to said city.

The relator moved to quash such proceedings on the ground that said ch. 516 is unconstitutional and void. The trial court granted said motion and directed the entry of a judgment quashing the writ, and from the judgment entered thereon the relator has appealed.

The cause was submitted for the appellant on the brief of *P. J. Winter,* city attorney, and for the respondents on that of *Goggins, Brazeau & Goggins* of Grand Rapids and *M. G. Eberlein* of Shawano.

ESCHWEILER, J. Ch. 516, Laws 1919, is entitled "An act to detach a portion of the town of Richmond and add such detached portion to the city of *Shawano,* all in Shawano county."

By sec. 1 of that chapter it was provided that all that portion of section 36 in the said town of Richmond not then included within the corporate limits of the city of *Shawano,* "is hereby detached from the said town of Richmond and attached to and made a part of the said city of *Shawano.*"

By sec. 2 provision was made for apportioning to the city of *Shawano* the assets and liabilities of the town of Richmond.

Sec. 3 provided for a meeting of the supervisors of the town of Richmond and of the city council of the city of *Shawano* for the purpose of making a settlement between the city and town according to the provisions of the act.

The supervisors of the town refusing to meet with the common council, these proceedings were instituted.

The trial court sustained the contention of the respondents, supervisors of the town, that said ch. 516 was void in that it was a special act and in effect amended the charter of said city and was within the inhibition of sec. 31, art. IV, Const., which, so far as material here, now provides as follows: "The legislature is prohibited from enacting any special or private law in the following cases: . . . 9th. For incorporating any city, town or village, or to amend the charter thereof."

The appellant city contends:

(1) That not being under a special charter, but having come under the provisions of the general charter, being ch. 45*t,* secs. 925—1 to 925—169, Stats., it receives its power

by virtue of the general law and not by virtue of any grant to it by any "charter," as the term is used in the constitutional provision, art. IV, sec. 31, sub. 9, *supra*.

(2) That in any event the act in question, merely providing for the annexation of territory, is not in the nature of an amendment to any charter, if there be one, of the city of *Shawano*, and is therefore not within the prohibition of the constitution above quoted.

(3) And lastly, that the act in question is a proper exercise of legislative power as an expression of the judgment of the legislature that the objects of the corporate powers of the appellant city cannot be attained under the general laws providing for the annexation of territory in the manner prescribed in ch. 45*t*, Stats., and that therefore it is valid under a reasonable construction of the legislative powers and duties found in the three following provisions of the constitution, viz.:

Art. IV, sec. 32. "The legislature shall provide general laws for the transaction of any business that may be prohibited by section thirty-one of this article, and all such laws shall be uniform in their operation throughout the state."

Art. XI, sec. 1. "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage;" and

Art. XI, sec. 3, which, so far as material here, is as follows: "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, . . ."

On the first point it is clear that the city of *Shawano* is in existence under the general charter law, ch. 45*t*, Stats., as a municipal corporation, functioning as such under the powers

conferred on it by a "charter" in the ordinary meaning of that term and within the meaning of the same term as used in the constitutional provision in question, as much so as though it were under the old form of a special charter or one given by legislative act to it in particular. *Platt v. City and County of San Francisco,* 158 Cal. 74, 95, 110 Pac. 304; *State ex rel. Arosin v. Ehrmantraut,* 63 Minn. 104, 107, 65 N. W. 251.

We can see no valid reason for not applying the same rule to a municipality obtaining its charter under a general law that is applicable to a private corporation obtaining a charter under a general incorporation law, and such rule is well recognized as to private corporations. *Lindsey & Phelps Co. v. Mullen,* 176 U. S. 126, 136, 20 Sup. Ct. 325; *Att'y Gen. v. Perkins,* 73 Mich. 303, 41 N. W. 426; *State ex rel. Ross v. Anderson,* 31 Ind. App. 34, 67 N. E. 207; *Baker v. Smith,* 41 R. I. 17, 26, 102 Atl. 721; 1 Words & Phrases (2d series) 651.

The city of *Shawano* therefore is existing and operating under a "charter" as the term is used in sub. 9, sec. 31, art. IV, Const., *supra.*

On the second point, as to whether or not the description of the territory included within the corporate limits of such a chartered corporation as is the appellant is a part of its charter, we have no difficulty in holding that the description of the territory included within its corporate limits is as essential a part of its charter as any other provision therein contained.

While it is true that under sec. 925—5, Stats., as now amended by ch. 183, Laws 1917, the patent which the governor must issue under the great seal constituting a city a body corporate need no longer contain a description defining the boundaries of the city, as was required to be inserted therein prior to said last mentioned amendment, yet a particular description of such boundaries is still, as before such amendment, required to be filed in the office of the

secretary of state pursuant to sec. 925—21*ab*. Also, sec. 925—21*b* provides for city boundary surveys to be made and recorded in the register of deeds' office, and that after the lapse of one year such survey shall be conclusive evidence of the facts appearing therefrom. It is evidently, therefore, the legislative purpose to require a formal and precise description of the corporate boundaries to be made a part of the public records concerning each particular municipal corporation, and such description must necessarily be considered a part of its charter.

Appellant further contends that the city, being incorporated under the general charter law and receiving its corporate powers by virtue of such general law, cannot be differentiated in the transaction here involved from such a corporate entity as a town or county, each of which is declared by statute to be a body corporate by secs. 773 and 650, Stats., respectively; and this court having held in the cases of *State ex rel. Ervin v. County Board,* 163 Wis. 577, 582, 158 N. W. 358; *Cathcart v. Comstock,* 56 Wis. 590, 608, 14 N. W. 833; and *State ex rel. Graef v. Forest Co.* 74 Wis. 610, 615, 43 N. W. 551, that the changing of boundaries of such bodies corporate, viz. towns and counties, and annexing or detaching territory thereto and therefrom, can be lawfully done by act of the legislature, the same rule should apply to a municipal corporation such as the city here.

That there is a substantial distinction between local organizations for governmental purposes, such as towns and counties, which may be and almost universally are created by action of the legislature with or without the consent or application of the residents thereof and which have been uniformly designated as *quasi*-municipal corporations, and municipal corporations proper, such as cities and villages, which become such corporate entities by virtue of the expressed wish and initial action of and on the part of the inhabitants of the included territory, was recognized at an

early day in this state, has been steadfastly adhered to since, and still is. *Norton v. Peck,* 3 Wis. 714, 721; *Bushnell v. Beloit,* 10 Wis. 195, 228; *Eaton v. Manitowoc Co.* 44 Wis. 489, 493; *Cathcart v. Comstock,* 56 Wis. 590, 606, 14 N. W. 833; *Lund v. Chippewa Co.* 93 Wis. 640, 644, 67 N. W. 297; *State ex rel. Thompson v. Welbes,* 129 Wis. 639, 641, 109 N. W. 564.

This substantial distinction, therefore, makes rulings with reference to the *quasi*-municipal corporations which have no charter as such from the state inapplicable to the situation here concerning a municipal corporation proper which has such charter as is referred to in Const., art. IV, sec. 31, sub. 9, *supra.*

The boundaries of the city of *Shawano,* therefore, being a part of its charter, any change therein by increase or diminution thereof is necessarily a change and therefore an amendment to its charter and within the constitutional prohibition. *Smith v. Sherry,* 50 Wis. 210, 215, 6 N. W. 561; *State ex rel. Att'y Gen. v. Cincinnati,* 20 Ohio St. 18; *Copeland v. St. Joseph,* 126 Mo. 417, 426, 29 S. W. 281; *Conklin v. Hutchinson,* 65 Kan. 582, 70 Pac. 587; *Extension of Boundaries of City of Denver,* 18 Colo. 288, 32 Pac. 615; *Little Rock v. Parish,* 36 Ark. 166; *Levitt v. Wilson,* 72 Kan. 160, 83 Pac. 397.

On the third and last point, which in effect is that the duty is mandatory upon the legislature to provide for the incorporation of cities and villages by general law: that when the objects of such corporate powers cannot be attained under general laws, namely, such provisions as are found in secs. 925—17 to 925—21*a* in ch. 45*t* of the general charter law for the annexation and detaching of territory to and from cities under the general charter law, then if the legislature determines in its judgment that the particular annexation here involved could not, for any reason, be carried out under those general provisions of the charter law,

it is the duty of the legislature, in order to attain the objects of the corporation, to meet or overcome such difficulty by special act in the manner attempted here.

We can, however, recognize no sufficient weight to such argument as will support the validity of the enactment of ch. 183, Laws 1917, in face of the plain prohibitory provision in Const., art. IV, sec. 31, sub. 9.

It follows therefrom that the circuit court was right in holding said act unconstitutional and void, and the judgment should therefore be affirmed.

By the Court.—Judgment affirmed.

SCHWARTZ, Plaintiff in error, vs. THE STATE, Defendant in error.

March 13—April 6, 1920.

Criminal law: Incest: Evidence of reputation: Witnesses: Delay in striking out incompetent testimony: Harmless error.

1. At the trial of the defendant on a charge of incest, testimony of three witnesses to his bad reputation for chastity and morality should have been stricken out and the jury admonished to disregard it, where it appeared on cross-examination that each witness had heard no one discuss such reputation except the others.
2. Where it appeared that such witnesses had no knowledge as to defendant's bad reputation except such as they had acquired from each other, but the circumstances were strongly corroborative of the defendant's guilt and it does not seem probable that another jury would reach a different conclusion, the failure to strike out the evidence and instruct the jury to disregard it until the close of the testimony, sixteen hours after its admission, was harmless.

ERROR to review a judgment of the municipal court of Milwaukee county: WALTER SCHINZ, Acting Judge. *Affirmed.*

Plaintiff in error was convicted of the crime of incest, and the case comes to this court upon a writ of error.

The cause was submitted for the plaintiff in error on the brief of *Curtis & Mock* of Milwaukee, and for the defendant in error on that of the *Attorney General, Winfred C. Zabel,* district attorney for Milwaukee county, and *George A. Shaughnessy,* assistant district attorney.

OWEN, J. Plaintiff in error, hereinafter called the defendant, assigns numerous errors relied upon for a reversal of the judgment of conviction. All have received careful consideration, but to treat them seriatim would unduly prolong this opinion and serve no purpose except to swell the surfeit of commonplace legal literature. But one assignment of error seems to be of sufficient importance to justify discussion.

Upon rebuttal, three witnesses testified to the bad reputation of defendant for chastity and morality in the community where he lived. Upon cross-examination each witness admitted that she had heard no one discuss the subject of defendant's reputation except the other two witnesses, so that their sole knowledge upon the subject was obtained from one another. When it appeared that their only knowledge of his reputation, in respect to which they testified, was such knowledge as had been acquired from one another, a motion was made to strike out their evidence. This was denied at the time, but, before the case was argued to the jury and some sixteen hours after the testimony had been received, the court struck it out and instructed the jury to entirely disregard it. It is apparent that the evidence should have been promptly stricken and the jury admonished to disregard it, and the question is whether prejudicial error resulted from the delay of the court in so doing.

In *Alsheimer v. State,* 165 Wis. 646, 163 N. W. 255, in his opening statement to the jury, the district attorney improperly said that he would prove that the defendants had been convicted of other crimes upon previous occasions.

This was objected to, and the court requested to admonish the jury to disregard it. The objection was overruled and the trial proceeded. At the close of the trial, and in the charge to the jury, the court told them to disregard the statement. In that case the failure of the court to promptly admonish the jury to disregard the statement of the district attorney was held reversible error. In view of the fact that the evidence upon which the defendants were convicted was far from conclusive, the court thought that the impression gained by the jury from the statement of the district attorney, and which was permitted to remain with them throughout the trial, might well have influenced their deliberations. While in this case the only direct evidence of plaintiff's guilt is that of his daughter, with whom the incestuous relations were alleged to have taken place, nevertheless the circumstances are strongly corroborative of guilt, and it does not seem to us probable that another jury would arrive at a different conclusion. Furthermore, if the evidence had been permitted to stand, its influence with the jury could have been but trifling. The admissions of the three witnesses that their knowledge of defendant's reputation for chastity and morality was gained entirely from conversations with one another, were sufficient to strip the evidence of force. From the fact that the court did ultimately strike it out, that it was exceedingly weak at the best, and that the record in the case satisfactorily establishes defendant's guilt, the circumstance does not constitute reversible error.

By the Court.—Judgment affirmed.

RICHARDSON, Plaintiff in error, vs. THE STATE, Defendant in error.

March 13—April 6, 1920.

Fires: Incendiary origin: Trial: Evidence: Sufficiency.

The evidence in this case is *held* sufficient to sustain the conviction of the defendant on a charge of setting fire to and burning a quantity of lumber covered by insurance.

ERROR to review a judgment of the circuit court for Buffalo county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, was charged with having set fire to and burned a quantity of lumber, the property of one Mike Drier, on October 24, 1916. Drier was charged with being a co-conspirator in the crime.

The information charges that the lumber so alleged to have been burned was insured against loss or damage by fire in the Concordia Fire Insurance Company of Milwaukee, Wisconsin, the Security Insurance Company of New Haven, Connecticut, and the Royal Insurance Exchange of London; and that the lumber was burned with the intention of injuring the aforesaid insurers.

The defendant pleaded not guilty. He was convicted after a jury trial and was sentenced to a term of three years in the state prison.

For the plaintiff in error there was a brief by *S. G. Gilman* of Madison and *C. A. Ingram* of Durand, and oral argument by *Mr. Ingram.*

For the defendant in error there was a brief by the *Attorney General* and *John F. Baker,* assistant attorney general, and oral argument by *Mr. Baker.*

SIEBECKER, J. It is contended that the evidence fails to establish the criminal agency of the alleged burning of the lumber and mill in question. This claim is made on the ground that there are no facts or circumstances corrobora-

tive of the confession defendant made to the deputy fire marshal. The confession is in substance that defendant, at the instigation and request of Mike Drier, the owner of the property burned by the fire, was driven from the place where he was working for Drier on the day preceding the night of the fire; that Drier told him that part of the lumber had burned the previous night and that he wanted defendant to set fire to the mill and lumber and finish the work; that Drier drove with defendant to the yard, provided bottles of kerosene, placed them in the sawdust of the mill in defendant's presence, and told defendant how and where to apply the kerosene in the mill and on the lumber piles to set the fire; that defendant and his son slept in a shanty near the yard; that while the son slept the defendant arose about midnight, went to the mill, applied the kerosene as directed by Drier to the sawdust in the mill and the lumber piles, and set fire to the lumber and the mill; that the mill and all the lumber excepting one pile were consumed by the fire.

It appears that Drier did send for defendant and take him to the lumber yard, as stated in the confession, that he refused the offer of one Brumner, together with two other men in Drier's employ living near the yard, on the day before the fire to watch at the yard and protect it against fire, saying he would secure a man near Durand to do this, and that he secured and brought defendant to the yards. The defendant states that Drier told him to remove the bolt of the pump handle and that he did this, so that no water could be secured to extinguish the fire. The evidence tends to show that the bolt was so removed. It also appears that the fires at the mill and at the lumber yards were separate fires, and that the fires of the previous night had been completely extinguished. These and other facts and circumstances adduced in evidence clearly tend to show that the fires on the night in question were not accidental but were of incendiary origin and are sufficient to sustain a finding to that effect in connection with defendant's confession.

State v. Jacobson, 130 Minn. 347, 153 N. W. 845; *State v. Brown* (103 S. C. 437) L. R. A. 1916D, 1299.

The evidence is well nigh conclusive connecting the defendant with this fire.

Several exceptions are urged to the remarks of counsel for the state in addressing the jury. We have examined these remarks and the court's rulings thereon. They disclose that the remarks pertained to evidentiary matters, and that in their nature they did not naturally tend to prejudice the jury, who had heard and seen the witnesses on the stand while testifying. We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

NEACY, Appellant, vs. CITY OF MILWAUKEE and others, Respondents.

February 10—May 4, 1920.

Municipal corporations: Lighting plant for city of Milwaukee: Abandonment of project: Contracts with municipalities: Compliance with requirements of charter: Contracts involving use of patented article: Competitive bidding: Power of commissioner of public works to reject bids: Appeal: Reversal as to decision on one cause of action.

1. In an action to enjoin the city of Milwaukee from expending corporate funds for the purchase of concrete posts for a municipal lighting plant, the evidence is *held* not to sustain the contention of plaintiff that the city had abandoned the erection of the lighting plant, or had forfeited its right to proceed with the project because its original plans may have been modified. *Neacy v. Milwaukee,* 151 Wis. 504, followed.
2. Where the commissioner of public works recommended rejection of the lowest bid and acceptance of the higher because of the incompetence of the lowest bidder, and, after the refusal of the common council to follow his recommendations, rejected all bids and drew up different specifications and let the contract to the sole bidder thereunder, the contract was void, the commissioner having no discretion, under sec. 10, ch. V, of the Milwaukee charter, to reject bids except where unreasonably high.

3. Contracts binding a municipality can be made only in the manner prescribed by the charter, and municipal officers must follow the prescribed procedure step by step.
4. The city's contract for concrete posts, which could only be manufactured by a patented process with the use of patented machines, is void, since the only manner by which the city could obtain the advantages of such patent rights was by contract for use of the patented process and machines under the city charter (sec. 23, ch. V), relating to the city's use of "patented article, process, combination or work," such charter provision having reference to every situation where, by reason of the existence of patent rights, there could be no competition in letting contracts.
5. Where the concrete posts, while not patented, could not be made except by machinery which was patented, sec. 23, ch. V, of the charter of the city of Milwaukee, providing for the acquirement of the right to the use of a patented article, must be complied with; this section of the charter being intended to exclude any other method of acquiring for the city the advantages of patented rights, articles, or processes.
6. Where the city charter required a contract for concrete posts to be let to the lowest bidder, a contract let to a manufacturer of concrete posts by patented process with the use of patented machines was void, since in such case material which did not constitute the subject of competitive bidding could not be used.
7. The supreme court, in reversing a judgment because of error committed upon one cause of action, will remand the case only as to such cause of action and not as to a cause of action upon which the judgment of the lower court was proper.

APPEAL from a judgment of the circuit court for Milwaukee county: G. N. RISJORD, Judge. *Reversed.*

Action to enjoin the city of *Milwaukee* and its officers from paying out any money on a contract between the city of *Milwaukee* and the *Universal Concrete Products Company* for the furnishing of concrete posts to be used as a part of the equipment of a municipal lighting plant. Although not pleaded as separate causes of action, two grounds for the injunction are set forth in the complaint. The complaint is therefore logically divided into two parts, which we shall refer to as the first and second cause of action.

The complaint alleges that the plaintiff is a resident and

taxpayer of the city of *Milwaukee* and brings the action for and on behalf of himself and on behalf of all other taxpayers of the city of *Milwaukee* similarly situated; that the defendant *Fred G. Simmons* is the commissioner of public works of the city of *Milwaukee;* that sometime during the month of July or the first part of the month of August, 1916, said *Fred G. Simmons,* pursuant to certain ordinances concerning the construction of the street lighting system of the city of *Milwaukee,* advertised for bids for the furnishing and delivery of concrete posts for a portion of said street lighting system, according to specifications on file in the office of said commissioner; that said bids were duly opened, and it was found that the lowest bidder was the Badger Stucco Works of Milwaukee, Wisconsin, whose bid was $91,750, and that among the other bidders was the defendant *Universal Concrete Products Company,* whose bid was $118,750; that on the 28th day of August, 1916, the said commissioner made a report of said bids to the council, in which he said:

"Under the provisions of section 10 of chapter V of the city charter and other laws applicable thereto, I beg leave to report to your honorable body a schedule of the bids for furnishing and delivery of concrete posts for the street lighting distribution system which were opened August 15, 1916. On said schedule of bids you will notice that Badger Stucco Works is the lowest bidder as far as figures are concerned, but I find upon investigation and reports made to me by the consulting engineer and others that said Badger Stucco Works has not presented evidence satisfactorily showing any experience whatever in this line of work or familiarity with the work, said concern never having manufactured concrete posts as required in the specifications.

"Said bidder is further unable to submit samples of the kind of concrete posts required by the specifications within the time designated in the specifications. I am further informed by the bidder that the bidder proposes to mold these concrete posts, and the consulting engineers and others advise that this process of molding posts will not produce a post that will meet the requirements as to specifications, and

the bidder has otherwise failed to satisfy me that he will be able to deliver the concrete posts as required by the specifications within the time limited thereby.

"Wherefore I now and hereby recommend to your honorable body to accept the bid of the lowest competent and reliable bidder, to wit, *Universal Concrete Products Company,* as shown on the schedule of bids annexed hereto, and my reasons for said recommendations are as above outlined, and I ask your honorable body to direct me under the provisions of section 10 of chapter V of the charter to let the work to the above last mentioned competent and reliable bidder."

On the 1st day of September, 1916, the committee on streets and alleys of the common council considered the communication. The said commissioner, the agent of the *Universal Concrete Products Company,* and all other persons who desired to bid for said proposed contract for concrete post shafts, were present. Said commissioner requested the said committee to recommend to the council that he be authorized to award said contract to said defendant *Universal Concrete Products Company,* on the alleged ground that said company was the only bidder competent to do the work, and that others then and there declared that they were able to deliver concrete post shafts complying with the specifications drawn as aforesaid by said commissioner; that a discussion then and there arose concerning the manufacture of posts by the centrifugal process, so called, and that the persons who desired to bid, other than the agent for said *Universal Concrete Products Company,* declared that if said concrete post shafts were to be manufactured by said process they would be excluded from bidding, and that the agent for said company said, in effect, that said company, through patents, controlled exclusively the manufacture of said concrete post shafts by the centrifugal process, and that at said meeting said *Simmons* stated, in effect, that said *Universal Concrete Products Company* enjoyed the exclusive and patented right to manufacture said concrete post shafts by the centrifugal process; that he desired to

award the contract for such posts to said defendant company; and that if said committee refused to recommend to the city council that he be authorized to so award the contract, he would reject all bids and draft new plans and specifications so as to exclude from the bidding all persons, firms, and corporations except said defendant *Universal Concrete Products Company;* that said common council refused to authorize said commissioner to let said work to said defendant *Universal Concrete Products Company,* and that, nevertheless, said defendant *Simmons,* as such commissioner, in pursuance of his plans to obtain said contract for said defendant *Universal Concrete Products Company,* rejected all such bids and thereupon drew a new official notice, specifications, etc., and re-advertised for bids thereon; that the specifications so prepared, and upon which new bids were called for, excluded any and all others except the *Universal Concrete Products Company* from bidding thereon, for the reason that the said concrete posts could be manufactured only by processes known as the centrifugal process, in which certain patented machines are used, which machines and the patents thereon were owned exclusively by said company; that on September 21, 1916, bids upon said re-advertisement were opened by said commissioner, and the only bid made in response to such re-advertisement was that of the *Universal Concrete Products Company,* and a contract was awarded thereon.

The foregoing constitutes the first cause of action. Upon the trial, an objection to the introduction of any evidence under the foregoing allegations of the complaint was made in the nature of a demurrer *ore tenus,* which objection was sustained.

For the second cause of action the complaint recites various proceedings of the common council of the city of *Milwaukee* looking towards the erection of a municipal lighting plant for said city, as a foundation for the claim which is made that said city presently has no power or authority to

construct a municipal lighting plant for the reason that it has not secured a certificate of necessity from the railroad commission. This question was passed upon by this court in *Neacy v. Milwaukee,* 151 Wis. 504, 139 N. W. 409, and the proceedings of the city of *Milwaukee* in such respect up to the time of the commencement of that action may be obtained by reference to that case. That case was dismissed by order of the circuit court on October 22, 1913. The further proceedings of the common council in the matter are set forth in the findings of the circuit court, which will hereinafter appear.

The issues raised by the answers of the city and the *Universal Concrete Products Company* to the second cause of action were tried before the court. The court made findings as to what had been done on the part of the city in the matter of prosecuting its general purpose to build a municipal lighting plant, subsequent to the decision in the former *Neacy Case.* By these findings it appears that various resolutions relating to the matter were introduced in and acted upon by the common council on November 24, 1913, January 19, 1914, and on April 13, 1914, all relating to the making of a survey to determine the number, character, and location of lamps, gas and electric, needed to light the streets and public buildings of the city of *Milwaukee.* On June 8, 1914, an ordinance was passed creating the position of engineer of street lighting survey. On June 22, 1914, an engineer of street lighting was appointed and confirmed. This official then proceeded with a survey, and completed it a year later, when he made a written report recommending the construction of a lighting distribution system. The plan contemplated the construction of a complete street lighting distribution system, and it was estimated that the initial instalment of the system would take approximately two years, the plan being to install the complete lighting system for the city initially, which would light the streets imperfectly, but, by additions of power and distribution construction from

time to time, increase the lighting capacity of the system so as to have it complete at the end of ten years. On September 13, 1915, a resolution was introduced in the common council (apparently not passed) authorizing the commissioner of public works to construct a lighting distribution system in a certain section of the city in compliance with the recommendations of the street lighting survey. On September 22, 1915, a resolution was passed by the common council appropriating a sum of money out of the municipal electric light fund for the purpose of installing a portion of the distribution system of an electric light plant units for the municipal electric light plant. On February 1, 1916, a resolution was introduced in the common council proposing to submit to a vote of the people the proposition of whether bonds should be issued for constructing a street lighting distribution system, which was passed on February 14th. On April 4, 1916, a bond issue was voted at a special election, in this form: "Shall bonds be issued for constructing a street lighting distribution system, same to constitute a part of the municipal lighting plant of the city of *Milwaukee,* in the sum of $750,000?" In August, 1916, the commissioner of public works advertised for bids on concrete posts for the distribution system. Bids were received and rejected, and the commissioner re-advertised for bids. On September 21, 1916, a contract was awarded to the defendant *Universal Concrete Products Company* to furnish concrete posts. This is the contract assailed in this action. An experimental circuit was completed in 1916, and was intended as one of the units of the whole distribution system, and so constructed as to be supplied with current from a generating plant owned by the city, if one is constructed, or with current obtained from other sources, and at the time testimony was taken 1,500 to 2,000 lamps were installed, the current being obtained from outside sources. The city has been engaged continuously in the installation of these units since the report of the engineer was adopted in 1915, and has re-

tained Mr. Vaughn as supervising engineer thereof, the city having now installed fifteen to twenty per cent. of the total recommended system, the electric current being purchased from the Milwaukee Electric Railway & Light Company.

Upon these findings the court ordered judgment dismissing the complaint, and from the judgment so entered plaintiff appealed.

Paul D. Carpenter of Milwaukee, for the appellant.

For the respondent *City of Milwaukee* there was a brief by *Clifton Williams,* city attorney, and *Charles W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

For the respondent *Universal Concrete Products Company* there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Howard T. Foulkes,* of counsel, all of Milwaukee, and oral argument by *Mr. Foulkes.*

The following opinion was filed March 9, 1920:

OWEN, J. It must be considered as settled by *Neacy v. Milwaukee,* 151 Wis. 504, 139 N. W. 409 (which was not modified by the case of *Wis. T., L., H. & P. Co. v. Menasha,* 157 Wis. 1, 145 N. W. 231, as counsel seems to think), that at the time of that decision the city had lawful authority to construct a municipal lighting plant, and if it has not such authority at this time it is because its legal rights in the premises have been forfeited since that decision.

It is the contention of appellant's attorney that the city has abandoned the building of the plant, or that, if it has not abandoned the project entirely, it has deviated in its present plans from the original proposition to such an extent as to be tantamount to an abandonment of it. The record discloses that the matter was taken up with promptness by the city council immediately after the former *Neacy Case* had been dismissed, and that from that time down to the commencement of this action the council was rather attentive to the project. An entire year was given up to the making of a survey with a view of determining the needs and neces-

sities of the city and the best method to pursue in the construction of the plant. There is no statute of limitations the running of which will bar the right of the city to continue further with the project. The actions of the common council referred to in the statement of facts certainly negative the idea that the project has been abandoned by the city. Neither do we see anything to the argument that the city has forfeited its rights to build the lighting plant because its original plans may have been modified or changed. Our conclusion is that the rights of the city, on the facts presented by this record, are controlled by the decision in the former *Neacy Case,* and that the judgment of the trial court upon this branch of the case should be affirmed.

We find more difficulty in agreeing with the disposition made by the trial court of the first cause of action set forth in the complaint. It seems that in obedience to certain ordinances of the city of *Milwaukee* the commissioner of public works prescribed specifications and called for bids for the furnishing of a quantity of concrete posts to be used as a part of the construction of the municipal lighting plant; that in response to the advertisement a number of bids were received. Upon the coming in and opening of those bids, the further power and authority of the commissioner was as is prescribed in sec. 10, ch. V, of the city charter (ch. 144, Laws 1875; ch. 324, Laws 1882; and ch. 388, Laws 1889). That section, so far as material here, provides:

"All contracts shall be awarded to the lowest bidder, who shall have complied with the foregoing requisitions. . . . And provided, further, that whenever the lowest bid for any work to be let by said commissioner, shall appear to said commissioner to be unreasonably high, the said commissioner is authorized to reject all bids therefor, and to relet the work anew, and whenever any bidder shall be, in the judgment of said commissioner, incompetent, or otherwise unreliable for the performance of the work for which he bids, the said commissioner shall report to the common council of said city a schedule of all the bids for such work, with

a recommendation to accept the bid of the lowest competent and reliable bidder for such work, with his reasons for such recommendation, and thereupon it shall be lawful for the said common council to direct said commissioner either to let the work to such lowest competent and reliable bidder, or to relet the same anew."

The only discretion vested in the commissioner is to reject all bids when the lowest bid shall appear to said commissioner to be unreasonably high. Whenever any bidder shall be, in the judgment of the commissioner, incompetent or otherwise unreliable for the performance of the work for which he bids, he must report the matter to the common council with a recommendation to accept the bid of the lowest competent and reliable bidder for the work, and thereupon it shall be lawful for the common council to direct said commissioner either to let the work to such lowest competent and reliable bidder or to relet the same anew. In this instance the commissioner reported the matter to the common council with a recommendation that the work be let to the one he considered the lowest reliable bidder, but who was not in fact the lowest bidder. He did not in the first instance exercise the discretion vested in him of rejecting all bids because the lowest bid was unreasonably high, and his action in recommending that the work be let to a higher bidder is conclusive that he did not then consider the lowest bid unreasonably high. It was only when the common council refused to authorize him to let the work to the bidder he recommended that he assumed to reject all bids. We have been referred to no provision of the city charter conferring authority upon the commissioner to reject all bids under such circumstances. His power is to reject bids only when the lowest bid is unreasonably high in his judgment. That such was not the case here is evidenced by the fact that he recommended that the work be let to one who was not the lowest bidder. When the matter was passed to the common council, his authority and duty in the premises

terminated. The power to reject the lowest bid and award the contract to a higher bidder, if not exercised firmly, wisely, and honestly, may easily lead to favoritism and corruption, and result in improvidence which it was intended to prevent. Because of the great responsibility attending its exercise, the power was placed with the supreme governing body of the city. It was not intended that the exercise of this responsible power by the common council could be arbitrarily nullified by the commissioner of public works in the manner here attempted. His conduct was an unauthorized assumption, if not clear usurpation, of power. It is well settled that contracts binding a municipality can be culminated only in the manner prescribed by the charter, and municipal officers must follow the prescribed procedure step by step. *Ricketson v. Milwaukee,* 105 Wis. 591, 81 N. W. 864; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *Allen v. Milwaukee,* 128 Wis. 678, 106 N. W. 1099; *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 417. When the commissioner referred the bids submitted in response to the first advertisement, to the city council, his only authority was to await and execute the directions of the common council. His re-advertisement was without authority, and the contract executed pursuant thereto was void.

We also think the contract was void because the posts called for by the second set of specifications are protected by patents. Sec. 23, ch. V, of the city charter provides:

"The said commissioner shall have power, under the authority of the common council, to make a contract or contracts with the patentee or his licensees or assigns, to use any patent or patented article, process, combination or work for the said city, at a stipulated sum or royalty for the use thereof. And thereupon the said commissioner shall have power to order any work, whether chargeable to the said city or to lots, parts of lots or parcels of land therein, to be done with the use of such patent or patented article, process, combination or work; and whenever the owner or agent of

any lot, part of lot or parcel of land in said city, or other person authorized by law to do such work, shall do the same and use any such patent or patented article, process, combination or work in doing the same, he shall pay to the said city the sum or royalty chargeable therefor by such patentee, his licensees or assigns, to the city under such contract, and shall be liable to suit by the said city therefor; or the amount of such sum or royalty may be charged as a special assessment upon the respective lots, parts of lots, and parcels of land in front of which such patent was so used, and collected for the use of said city, as other special taxes are collected."

In *Allen v. Milwaukee,* 128 Wis. 678, 106 N. W. 1099, it was held that this provision of the charter was intended to exclude any other method of acquiring for the city the advantages of patented rights, articles, or processes for any purpose. That the charter provision above quoted was not complied with in this instance is alleged in the complaint, and the contract here is void for that reason if the posts called for by the specifications are comprehended within the terms "patented article, process, combination or work," within the meaning of this charter provision. It is conceded that the post itself is not patented, but it is alleged that a post responding to the specifications cannot be made except by the centrifugal process, and that to successfully manufacture a post under that process it is necessary to use patented machines the patent to which as well as the machines themselves are owned exclusively by the *Universal Concrete Products Company.* While it may be conceded that the exact language does not include the posts here in question, as they constitute neither a "patented article, process, combination or work," we nevertheless think that the legislative intent is very clear. These posts are protected by a patent just as effectually as though the post itself were patented. The phrase employed in the statute is sweeping, and is no doubt intended to cover any product which is not the subject of competition by reason of the protection of patents in any manner, shape, or form. From the

broad and comprehensive phrase "patented article, process, combination or work," we conclude that the legislature intended to include every situation where, by reason of the existence of patent rights, there could be no competition. We so construe the statute.

But, independent of this charter provision, the same conclusion is necessarily reached by the application of a rule of law well established in this state to the effect that, where a city charter requires public work to be let upon competitive bids, material which does not constitute the subject of competitive bidding cannot be used. *Dean v. Charlton,* 23 Wis. 590. The principle of this case was somewhat limited in *Kilvington v. Superior,* 83 Wis. 222, 53 N. W. 487, where it was held that the principle did not affect such general city powers as lighting streets, purchase of a fire-engine, or the destruction of garbage, etc., which are generally and broadly conferred by other clauses of the charter as to which the requirement of competitive bidding is construed as merely regulative and not to require competitive bidding to apply where it cannot. See, also, *Allen v. Milwaukee, supra,* where the decision in *Kilvington v. Superior, supra,* is explained. Manifestly, the situation here does not fall within the principle of *Kilvington v. Superior,* because it conclusively appears that the general product of concrete posts does constitute a subject of competitive bidding. It is only the special concrete posts called for by the second set of specifications, which can be produced but by a single concern, that is not the subject of competitive bidding. It must not be thought that because, in all the cases dealing with this principle, the question arose by reason of the attempted use of a patented article, the principle does not apply unless the article is patented. The underlying consideration is that any article which is not a subject of competitive bidding is obnoxious to the provisions of city charters requiring that all contracts should be let pursuant to competitive bidding. As a rule, a patented article is not the

subject of competitive bidding. If, however, the article, for any other reason, is not the subject of competitive bidding, its use is just as obnoxious to charter provisions requiring competitive bidding. So, fundamentally, it makes no difference here whether or not this post is a patented article. It appears from the allegations of the complaint that it is not a subject of competitive bidding, and its use is prohibited by that provision of the city charter (sec. 10, ch. V) which provides that "all contracts shall be awarded to the lowest bidder." If it be a patented article, it may be obtained for the use of the city in the manner prescribed by sec. 23, ch. V, of the charter, above quoted. If it be not a patented article, then it would seem that its use is prohibited. But we have held that it is a patented article within the meaning of sec. 23, and that it may be procured for the use of the city in the manner provided therein. The provisions of sec. 23 having been ignored in the letting of the contract here under consideration, the contract is for that reason void under *Allen v. Milwaukee* and *Cawker v. Milwaukee, supra.*

While the judgment in this case must be reversed, it is not necessary that a retrial be had upon the second cause of action, so called, as the judgment of the court upon that branch of the case was proper. It will be sufficient to reverse the judgment and remand the case with instructions to take evidence upon those allegations of the complaint which we have indicated render the contract void, if true.

By the Court.—Judgment reversed, and cause remanded with instructions to take further evidence in accordance with this opinion.

A motion for a rehearing was denied, with $25 costs, on May 4, 1920.

WEGNER, Appellant, vs. SHEBOYGAN-ELKHART LAKE RAILWAY & ELECTRIC COMPANY and others, Respondents.

February 11—May 4, 1920.

Corporations: Action to foreclose trust deed on property of corporation: Parties to action: Right of bondholders in property: Costs: Refusal of trustee to act: Sale of mortgaged property by corporation: Assumption of mortgage debt by grantee: Merger of corporations: Appeal: Judgment proper except as to costs.

1. In an action by a bondholder to foreclose a trust deed given by the defendant corporation to secure payment of its bonds, other holders of the bonds secured by the same trust deed were properly made parties to the action.
2. The evidence in this case is *held* not to show that a corporation to which the defendant corporation transferred its property assumed, in consideration of such transfer, the payment of all defendant's debts, including the obligation evidenced by such bonds.
3. Where the corporation mortgagor had transferred the mortgaged property to another corporation, the court properly directed that the property be sold unless the defendants pay into court the ascertained value thereof, and that the proceeds of the sale, or the money deposited in lieu of such sale, after the payment of costs and expenses, be paid to the bondholders to apply on their respective judgments against the debtor corporation in the proportion that the bonds owned by each bears to the total amount of bonds outstanding.
4. Where a bondholder was required to bring the foreclosure action because of the trustee's refusal to do so, he was entitled to recover his costs and disbursements, notwithstanding his claims that other bondholders had no right to recover in such action and that certain property was covered by the lien were denied.
5. Where plaintiff was not awarded costs and disbursements, though entitled thereto, and where the amount of his costs and disbursements has not been ascertained, the judgment, though otherwise correct, will be reversed and the cause remanded to the circuit court with directions to permit plaintiff to have his costs and disbursements taxed and allowed and inserted in the judgment in his favor.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The action was referred to Francis Williams on an order to hear, try, and determine the issues raised by the pleadings and report his findings to the circuit court.

The complaint alleges, in substance, that the defendant *Sheboygan-Elkhart Lake Railway & Electric Company,* on April 1, 1904, executed 800 bonds for the sum of $1,000 each, bearing interest at the rate of five per cent. per annum, payable semi-annually; that, in order to secure payment of the principal and interest of the bonds, the *Sheboygan-Elkhart Lake Railway & Electric Company* made, executed, and delivered to the First Trust and Savings Bank of the city of Chicago its deed of trust covering and conveying all the property, real, personal, and mixed, then owned by the said company, as well as all of such properties it might thereafter acquire, including its franchise and all of its rights, then owned or thereafter acquired; that the *Sheboygan-Elkhart Lake Railway & Electric Company* caused 500 of said bonds, numbered from 1 to 500 inclusive, to be authenticated by the certificate of the First Trust and Savings Bank; that plaintiff is the owner of ten of the bonds, numbered from 60 to 70; that the First Trust and Savings Bank refused to pay the interest on these bonds when presented by him for payment; that by reason of the *Sheboygan-Elkhart Lake Railway & Electric Company's* refusal and neglect to pay the interest on the bonds, plaintiff now declares the principal due and payable; that the ten bonds owned by plaintiff are now the only outstanding bonds, the other 490 certified bonds being now in the possession of the *Sheboygan-Elkhart Lake Railway & Electric Company.*

Plaintiff further alleges that he applied to the trustee in said trust deed to institute proceedings for his relief, and that the trustee deemed it preferable for the plaintiff to proceed in his own name and therefore refused to institute proceedings; that subsequent to April 1, 1904, and after the delivery and sale of bonds to plaintiff the *Sheboygan-Elkhart Lake Railway & Electric Company* sold and trans-

ferred all of its real, personal, and mixed property, together with the income thereof, to the defendant the *Milwaukee & Fox River Valley Railway Company,* subject, however, to any rights, equities, and priorities existing by virtue of the trust deed; that the Wisconsin Trust Company claims to have a lien and interest in said property as trustee, but that its lien is subsequent and subordinate to the lien of the trust deed above described, which was given to secure the bonds in question which the plaintiff seeks to collect in this action. The complaint alleges, in addition, that there is due and owing to the plaintiff unpaid the principal sum of $10,000, with interest thereon from April 1, 1904, according to the tenor and effect of the bond. Plaintiff asks that the amount and value of the property of the *Sheboygan-Elkhart Lake Railway & Electric Company* transferred to the *Milwaukee & Fox River Valley Railway Company* be ascertained, and that the *Milwaukee & Fox River Valley Railway Company* be required to pay to the *Sheboygan-Elkhart Lake Railway & Electric Company* all income from said property, which sum, when so ascertained, be applied to the payment of the interest accruing and maturing upon the bonds of plaintiff; that all of the property of the *Milwaukee & Fox River Valley Railway Company* which is in any way being used in connection with any of the property of the *Sheboygan-Elkhart Lake Railway & Electric Company* be declared to be subject to the liens of the trust deed herein set forth; that the *Milwaukee & Fox River Valley Railway Company* be required to execute other deeds of conveyance of all of its franchises and property as additional security under the terms of the trust deed securing the bonds of the plaintiff; that the trust deed of the plaintiff be declared to be the first, prior, and binding lien upon all of the franchises and property of the *Milwaukee & Fox River Valley Railway Company;* that an account be taken between the *Sheboygan-Elkhart Lake Railway & Electric Company* and the *Milwaukee & Fox River Valley Railway Company;*

that the *Milwaukee & Fox River Valley Railway Company* be ordered to pay to the *Sheboygan-Elkhart Lake Railway & Electric Company* whatever shall be found due said company upon such an accounting, this sum to be applied upon payment of the debt due plaintiff; that an accounting be had between plaintiff and the *Sheboygan-Elkhart Lake Railway & Electric Company* and said company decreed to pay what is owing to the plaintiff; that a receiver be appointed of the *Milwaukee & Fox River Valley Railway Company* and the *Sheboygan-Elkhart Lake Railway & Electric Company* pending the hearing of this case and until further order of the court.

The answers of the defendants are, in brief, as follows:

The *Sheboygan-Elkhart Lake Railway & Electric Company* alleges that the bonds of which plaintiff claims ownership were delivered to his assignor, *P. P. Brickbauer,* in May, 1904, as collateral security for a claim which the assignor might then have against the *Sheboygan Company;* that more than six years have elapsed since the bonds were delivered to *P. P. Brickbauer,* and that *Brickbauer* has made no claim against the *Sheboygan-Elkhart Lake Railway & Electric Company,* and is therefore barred by sec. 4222, Stats.; that plaintiff knew no interest has been paid on the bonds since the alleged purchase of the bonds by plaintiff from *Brickbauer;* that at the time of the purchase of the bonds by plaintiff from *Brickbauer* plaintiff knew that the *Sheboygan-Elkhart Lake Railway & Electric Company* had not sold, transferred, or conveyed its property to the *Milwaukee & Fox River Valley Railway Company,* and that ninety of the authorized issue of 500 bonds had been issued and were then outstanding as a debt against the *Sheboygan-Elkhart Lake Railway & Electric Company;* that prior to the commencement of this action the plaintiff neglected to request of the trustee that the action be brought by said trustee, and neglected to tender the trustee an indemnity bond for the bringing of the action. The *Sheboygan-Elk-*

hart Lake Railway & Electric Company also denies that plaintiff is the *bona fide* owner of the bonds, and alleges that *P. P. Brickbauer* is a necessary party to this action.

John Dassow filed an answer alleging that for the past three years he has held and now holds in his possession sixty-nine bonds of the *Sheboygan-Elkhart Lake Railway & Electric Company,* which are now held by him as collateral security for the payment of moneys advanced to that company which is now due and unpaid, and that no proceedings have been had or taken to redeem the bonds held by him. He also prays that his rights in this action be ascertained and protected by the court.

George Brickbauer answers that he is in possession of forty-nine bonds issued by the *Sheboygan-Elkhart Lake Railway & Electric Company* and delivered to him as collateral security for money furnished and services rendered by him to the company, and that no part of them has been paid. He denies that the plaintiff is now or ever was the owner of the bonds mentioned in the complaint.

The issues thus formed by the pleadings were referred to Francis Williams, court commissioner, to hear, try, and determine. The court commissioner found, in substance:

That the *Sheboygan-Elkhart Lake Railway & Electric Company* and the *Milwaukee & Fox River Valley Railway Company* are corporations duly organized under the laws of this state; that the *Sheboygan-Elkhart Lake Railway & Electric Company* on April 1, 1904, executed 800 bonds, with interest-bearing coupons attached to each of the bonds, being for the sum of $1,000 with interest at the rate of five per cent., payable semi-annually, the bonds maturing on April 1, 1934, with option on the part of the holders to declare the whole amount due upon failure to pay any instalment of interest due thereon; that the bonds were secured by a deed of trust to the First Trust and Savings Bank of Chicago of all the property, real, personal, and mixed, then owned by the *Sheboygan-Elkhart Lake Rail-*

way & Electric Company, as well as all of the same which it acquired immediately thereafter, together with the rents, issues, and profits thereof, including franchises and rights then owned or thereafter acquired; that this deed of trust was duly recorded and 500 of the bonds, from 1 to 500 in number, authenticated by the certificate of the First Trust and Savings Bank of Chicago and delivered to the *Sheboygan-Elkhart Lake Railway & Electric Company;* that the latter company sold and delivered eleven of said bonds to *Peter Brickbauer;* that *Peter Brickbauer* sold and delivered the said eleven bonds to *Albert H. Wegner* with coupons attached thereto, numbered from 61 to 69, inclusive; and numbers 129 and 130, upon which no part of the principal or interest has ever been paid; that the *Sheboygan-Elkhart Lake Railway & Electric Company* failed and refused to pay interest upon the bonds, and that plaintiff declared the principal sum of the bonds due and payable in accordance with the terms of the bonds and the trust deed securing the same; that the following bonds were outstanding against the *Sheboygan-Elkhart Lake Railway & Electric Company* at the time the property of the company was transferred to the *Milwaukee & Fox River Valley Railway Company,* no part of the interest or principal of which had ever been paid: forty-nine bonds to *George Brickbauer,* sixty-eight to the Dairyman's National Bank of Sheboygan Falls, which sixty-eight bonds were afterwards assigned to *John Dassow,* present owner of the same; that shortly after April 19, 1904, *George Brickbauer* was elected president of the *Sheboygan-Elkhart Lake Railway & Electric Company;* that in November, 1908, *George Brickbauer* and others caused to be incorporated the *Milwaukee & Fox River Valley Railway Company* with an authorized capital of $25,000 divided into 250 shares of the par value of $100 a share; that *George Brickbauer* subscribed for 120 shares of the capital stock of the company and that other persons subscribed for seventeen shares; that *George Brickbauer* was thereafter elected presi-

dent of the *Milwaukee & Fox River Valley Railway Company.* The referee found, in addition, that the *Milwaukee & Fox River Valley Company* thereafter acquired the property of the *Sheboygan-Elkhart Lake Railway & Electric Company;* that the *Milwaukee & Fox River Valley Railway Company* shortly after its organization increased its capital stock from 250 shares to 750 shares; that *George Brickbauer* thereupon subscribed for 255 shares of such increase and thereafter controlled all of the issued stock of said company excepting five shares which were held by the other directors of the company; that on December 5, 1907, the *Milwaukee & Fox River Valley Railway Company* authorized a bond issue of $200,000 to be secured by a trust deed of all the property of the company, which trust deed was signed and delivered to the Wisconsin Trust Company of Milwaukee, the bonds being duly authenticated by said trustee; that when the plaintiff requested the trustee mentioned in the trust deed authenticating the bonds of the *Sheboygan-Elkhart Lake Railway & Electric Company* to start action against said company because of its default of payment of the interest of the bonds, it refused, and plaintiff is therefore entitled to maintain this action and to foreclose the trust deed described in the complaint; that there is due the plaintiff, *Albert H. Wegner,* the sum of $11,000 and interest at six per cent. from October 1, 1904, and there is due the defendant *George Brickbauer* $49,000 with interest at six per cent. from October 1, 1904; that there is due the Dairyman's National Bank, its successors and assigns, $68,000 with interest at six per cent. from October 1, 1904; that the fair and reasonable value of the property of the *Sheboygan-Elkhart Lake Railway & Electric Company* turned over to the *Milwaukee & Fox River Valley Railway Company* is $1,125.

As a conclusion of law the referee found that the indebtedness upon the bonds and trust deed found to be due the plaintiff, the defendant *George Brickbauer,* and the

Dairyman's National Bank should be declared to be a lien upon the real property of the *Milwaukee & Fox River Valley Railway Company* to the amount of $1,125, which lien shall be prior to any lien originating against the property subsequent to the recording of the trust deed, and that to satisfy this lien a sale of the property should be ordered and directed unless the *Milwaukee & Fox River Valley Railway Company* pays such amount into court before the sale.

The trial court modified the findings of the referee by finding that, if the property upon which the judgment becomes a lien shall be sold thereunder, the sheriff shall thereupon pay from the proceeds of the sale the legal expenses of the sale and the costs of the action which are taxed and included in the judgment, with interest, and shall then pay the balance of the proceeds into court; that out of said proceeds then remaining in his hands the clerk shall pay to the plaintiff 11-128 thereof; that the residue of the proceeds shall be retained by the clerk for further order of the court for payment thereof to the persons entitled thereto; that if before the sale any of the defendants shall pay into court the sum of $1,125, together with interest from and after the date of the judgment, and thereby prevent such sale, the clerk shall pay 11-128 of the sum remaining after costs as taxed in the judgment, with interest, have been deducted. The court denied costs to the plaintiff.

Judgment was rendered in favor of the appellant and the respondents *George Brickbauer* and the estate of *John Dassow* for the amount of the principal and interest due on the bonds respectively held by each of them, and adjudged the entire bonded indebtedness to be a prior lien upon all the property of the respondent the *Milwaukee & Fox River Valley Railway Company* to the amount and value of $1,125, and that such lien is prior and paramount to any right, claim, or interest of the defendant the *Milwaukee & Fox River Valley Railway Company.*

This is an appeal from such judgment.

J. W. Wegner of Milwaukee, for the appellant.

For the respondents there was a brief by *D. T. Phalen* and *A. C. Prescott,* both of Sheboygan, and oral argument by *Mr. Prescott.*

The following opinion was filed March 9, 1920:

SIEBECKER, J. The action is brought to foreclose the trust deed given to secure payment of the bonds of the *Sheboygan-Elkhart Lake Railway & Electric Company* and to charge the property of the *Milwaukee & Fox River Valley Railway Company* with the debts of the former company, upon the grounds that the latter company acquired the property of the former under an arrangement between the companies whereby the latter assumed and is in equity obligated to pay the debts of the former. An accounting is demanded to establish the amount of the alleged liability of the latter company to the former under the facts of the case, and it is demanded that foreclosure be decreed of this trust deed and the judgment be made effective against the latter company and that its property be subjected to the claims of the plaintiff and that he be awarded appropriate relief to enforce satisfaction of his judgment against the companies.

It is contended that the court erred in ordering that *Brickbauer* and *Dassow,* who claimed to own bonds secured by the trust deed sought to be foreclosed by the plaintiff, be made parties defendant. These persons were interested as bondholders under the same security by which plaintiff is secured, and their rights and security as such bondholders are involved and will be affected by this litigation. Their right to relief upon their bonds and their interests thus involved are appropriate subjects for inquiry and determination in connection with those of the plaintiff. It is considered that the court properly made them parties to the action for the purpose of a complete determination of the rights of all the parties to the property involved in this foreclosure action.

It is strenuously contended that the court erred in omitting to find that the *Sheboygan-Elkhart Lake Railway & Electric Company* went out of existence and practically became merged in the *Milwaukee & Fox River Valley Railway Company,* and that the latter company thereby became answerable for all the liabilities of the former, including the bonded indebtedness involved in this action. An examination of the record fails to disclose facts showing that the old company went out of existence or that it became consolidated or merged with the new company. These companies maintained an independent existence and no steps were taken to effect a merger of the old company with the new one. There are no facts shown which indicate that the new company is a successor corporation within the equitable principle relied upon by the plaintiff. The facts are plain that whatever property of the old company was transferred to the new company was pursuant to authority conferred by each of the companies on their officers to negotiate for a sale and a transfer of the properties from the one to the other. This result the court and referee found as a fact, and the evidence sustains this conclusion. It is claimed and urged that the sale and transfer of the property of the old company to the new company was upon the condition that the new company pay all of the debts of the old company, including the old company's indebtedness evidenced by its bonds, which had been issued and sold by it for a valuable consideration. The documentary evidence adduced to show that each company passed resolutions to effectuate a sale and transfer of all the property of the old company to the new company upon the condition that such transfer carried with it the obligation by the new company to pay all of the old company's indebtedness, is not clear upon this point. The terms of the various resolutions, when applied to the transactions involved, in the light of the rights, interests, and title the old company had in and to the properties affected thereby, show that the parties had no express under-

standing or agreement to the effect that the new company was to assume and obligate itself to pay all of the old company's indebtedness. The claim that the new company assumed such obligation is also negatived by the facts showing that the old company had no title to a considerable portion of the property which the old company claims was so transferred.

Much of its acquired right of way which it is claimed was so transferred had become forfeited, as was its franchise for occupying the streets of Plymouth, which the plaintiff now claims constitutes a very substantial part of the consideration upon which the bond issue here involved was based. We are persuaded, upon study of the facts and circumstances disclosed by the record, that the referee and trial court are sustained in their conclusion that the transactions between the officers of the two companies pertaining to the transfers of property from the old company to the new company do not establish an agreement to the effect that the new company assumed, in consideration of the sale and transfer of the old company's property, to pay all of the old company's debts, including the obligation evidenced by the bonds involved in this litigation. The referee's findings of fact as modified and supplemented by the trial court cannot be held to be against the clear preponderance of the evidence on this issue, and they must be affirmed.

It is considered that the court correctly adjudicated and declared the rights of *Dassow* and *George Brickbauer* as owners of the bonds secured by the trust deed in question and properly awarded them judgment for recovery of such part of the surplus as may remain of the $1,125 to be applied in satisfaction of the judgment as their proportionate ownership of the outstanding bonds bears to that amount.

It is contended that the court grievously erred in finding the value of the property of the new company acquired by purchase from the old company. The evidence on this sub-

ject is voluminous, involving many items and numerous transactions, and cannot be repeated here. An attentive and exhaustive examination of it has led us to the conclusion that the values found by the referee are amply sustained by the evidence and cannot be disturbed.

An exception is urged to the court's ruling denying plaintiff recovery of his costs and disbursements. The trial court held that, since the plaintiff's claims in the trial court to the effect that neither *Dassow* nor *George Brickbauer* was entitled to any relief in the action his claim of the value of the property sold and transferred from the old company to the new company was grossly in excess of the actual value as found by the referee, and, his claim to a lien on all the new company's property not being well founded, constituted good grounds to deny him recovery of his costs and disbursements. This ruling of the trial court omits consideration of the necessity of plaintiff's prosecuting the action to obtain the enforcement of his rights and claims to the extent awarded him. His complaint presents a substantial and legitimate basis for prosecuting this action, and it appears his rights were denied him and that he was compelled to enforce them through this litigation. Under these circumstances we consider that the trial court erred in exercising its discretion on plaintiff's rights to recover his costs and disbursements in this action. It is considered that plaintiff is entitled to recover them.

The amount of plaintiff's costs and disbursements has not been ascertained, hence the judgment must be reversed and the cause remanded to the circuit court with direction to permit the plaintiff to have his costs and disbursements taxed and allowed and inserted in the judgment in his favor. In all other respects the judgment is correct, and the court is directed to award the same relief to the parties to the action as is awarded in the judgment appealed from, except that the plaintiff recover his costs and disbursements.

By the Court.—The judgment is reversed, and the cause remanded to the circuit court with direction to award judgment as indicated in the opinion.

A motion for a rehearing was denied, with $25 costs, on May 4, 1920.

DARLING and others, Respondents, vs. NELSON and another, Appellants.

February 13—May 4, 1920.

Limitation of actions: Action for money damages: Time of accrual: Failure to plead statute of limitations where equitable relief is sought: Effect: Question first raised on appeal.

1. Where sisters were induced by brothers to convey to them their interests in the realty of their deceased father for an amount less than the actual value of such interests, the sisters' cause of action for damages accrued at the time of such conveyance and was barred where not brought within six years thereafter, under sub. (3), sec. 4222, Stats., notwithstanding the sisters did not discover that they had not received full value for their interests until within six years before the commencement of the action, such action not being an equitable action for relief from fraud within sub. (7) of said section, providing for the commencement of such action within six years after discovery of the fraud.
2. Where the court denied cancellation of the deeds prayed for by plaintiffs and rendered judgment awarding money damages, the supreme court on appeal will reverse the judgment on the ground that the action was not brought within six years from its accrual, notwithstanding defendants did not plead the statute of limitations, plaintiffs not having asked for money damages and defendants therefore having had no opportunity to plead such statute.

APPEAL from a judgment of the circuit court for Waushara county: BYRON B. PARK, Circuit Judge. *Reversed.*

The plaintiffs and defendants other than Edith Nelson are brothers and sisters and children of one Thomas Nelson. Edith Nelson is the wife of *Andrew Nelson.*

The estate of Thomas Nelson, who died in May, 1896, was duly probated in the county court of Waushara county, and the real estate of which he died seised, comprising 160 acres of land, was assigned in equal shares to said children subject to the dower and homestead rights of the widow, who still survives.

For a long time after the death of the father the defendant *Sever Nelson,* who was the second oldest child, with the aid of his mother conducted and managed the entire farm, and thereby all the members of the family remaining at home received support and care. In 1903, 1904, and 1910 the daughters *Clara, Mary,* and *Olga* were respectively married.

In 1907, pursuant to an understanding between all interested, the two plaintiffs *Olga* and *Clara* jointly executed two deeds, one of the forty-acre tract upon which was the homestead, to the defendant *Sever Nelson,* and a second of the remaining three forties to the defendants *Sever* and *Andrew.* The first of these was recorded on the day the two were executed, December 11th. A few days later the other sister, the plaintiff *Mary,* executed two similar deeds, neither of which was recorded.

At the time of the conveyances in 1907 it was understood as a part of the then agreement that the widowed mother should continue to live on the farm and be supported by the defendants *Sever* and *Andrew.*

Early in 1908 the defendants *Sever* and *Andrew Nelson,* with the mother, executed a mortgage for the sum of $1,800 which was recorded. Out of this money $200 was paid to each of the sisters *Clara* and *Mary,* being the amounts that it is claimed were to be paid by the two boys to such sisters under the agreement of December, 1907.

In 1910 the farm was rented for four years to *Olga* and her husband, who retained the possession thereof during that time and took care of the widow under an agreement

for compensation for so doing to be paid by the defendant *Sever.*

Early in 1912 the defendants *Sever* and *Andrew,* being desirous of executing a new mortgage upon the farm, discovered that but one of the four deeds executed in December, 1907, had been recorded. Thereupon new deeds were obtained from the three sisters, similar in form to those of 1907, and which were recorded January 13 and 18, 1912, and immediately afterwards a new mortgage for $2,500 was executed.

In July, 1913, the plaintiffs claimed to have discovered in some way that there was a mistake in the computation as to their respective interests as heirs at law at the time of the transaction in 1907, but nothing definite was known or stated in that regard.

In December, 1913, the plaintiff *Olga* was paid $1,000 by the defendants *Sever* and *Andrew,* and a receipt given signed by the plaintiff *Olga Darling* and her husband in the following language: "Received of *Sever Nelson* and *Andrew Nelson* $1,000 in full payment of all claims against them and the estate of Thomas Nelson." This $1,000 covered two items, one of the $300 which it was agreed should be paid to her in December, 1907, and $700 for the support of the mother during the four years the *Darlings* were in possession of the farm; it having been understood in 1907 that the plaintiff *Olga Darling* was entitled to a larger interest than the two sisters on account of her having lived longer on the premises and assisted in taking care of the same.

This action was commenced in 1918. It was an equitable proceeding wherein the three sisters as plaintiffs demanded judgment against the defendants canceling and setting aside the deeds heretofore described of 1907 and 1912 and the record thereof in the office of the register of deeds, and requiring the defendants to account for the rents and profits

of the farm and adjusting the rights of the parties in the premises. The substance of the allegations upon which such prayer for relief was based were recitals as to the relationship of the parties, the trust and confidence the plaintiffs had in the defendant brothers, the assistance the plaintiffs gave in carrying on the work on the farm during the times they were still living there and on their occasional returning to the farm and then helping, and their unfamiliarity with business transactions and ignorance of land values. That in 1907 it became necessary to build a new barn on the farm and that the plaintiffs then agreed that they would convey eighty of the 160 acres to the defendants, and that as consideration therefor the defendants should pay to the plaintiffs *Mary* and *Clara* each the sum of $200 and to the plaintiff *Olga* $300. That then the defendants were to pay off the existing mortgage on the premises, build a barn on the homestead, and support the mother during the balance of her life, and that upon the death of the mother each of the plaintiffs would share equally with the defendants in the remaining eighty acres of the farm, and until such time such last mentioned eighty acres, including the homestead, should continue to be owned in equal shares by the parties. That pursuant to the agreement the defendant *Sever Nelson* had the deeds prepared for execution, but made them contrary to the agreement heretofore described; that plaintiffs relied upon the promise of the defendant *Sever* to have the papers so prepared as to carry out what they allege was the agreement and his representation to them at the time the deeds were presented for signature that they were all for but eighty acres and did not include the homestead forty.

That as to the second set of deeds in January, 1912, the defendant *Sever* represented to plaintiffs that he needed their signatures to such papers as were then presented in order to enable him to borrow money to pay up the old mortgage and that such papers so presented, signed, and

executed by the plaintiffs were exactly the same as the prior ones of 1907, and that they were not read nor explained to plaintiffs at the time of their signing.

Defendants answered and alleged in effect that the deeds of 1907 and 1912 were respectively in accordance with the agreement made in 1907, and that those of 1912 were solely for the purpose of taking the place of the two which had been executed in 1907, and, being lost or mislaid, had never been recorded. Defendants further answered and counterclaimed to the effect that they had been in possession of said premises holding adversely to the plaintiffs by title founded upon the deeds of 1907, and further, that while so holding possession under said deeds and adversely to the plaintiffs they have made valuable improvements upon the said premises and paid taxes thereon. The defendants demanded judgment that the complaint be dismissed, or, in case of the plaintiffs being awarded possession of the premises or any part thereof, that the defendants be allowed for improvements and taxes paid and for such other and further relief as may be just and equitable.

By amended answer the defendants asserted as an additional defense that the plaintiffs are estopped by laches from claiming title to said lands or any interest therein.

By reply the plaintiffs denied every material allegation in the counterclaims.

The court found: That there had been an increase of $1,500 in the value of the homestead between 1896 and 1907, which increase was due almost entirely to the improvements made thereon; that the farm in 1907 was worth about $7,000, and in 1912 about $8,500, and in the year 1918 to 1919 about $9,000. That upon *Andrew Nelson,* the youngest child, becoming of age in 1907, all the parties interested came to an understanding that the estate should be divided and as a basis of division that the three girls should be paid off and the land deeded, subject to the rights of the widow, to the two defendants *Sever* and *Andrew,* but

to be so deeded that *Sever* should have the larger interest in recognition of work and labor since the death of the father. That none of the plaintiffs gave any attention or heed to the matters of the estate, but relied completely and entirely upon *Sever* and knew nothing of business matters nor what their interest in the farm was. That the defendant *Sever* went about the business of carrying out the understanding as to the deeding of the property with the purpose of dealing fairly and rightly with his sisters, and never at any time, and certainly not until after the year 1913, had any purpose to do them any wrong and had no knowledge that any wrong had been done them. That after the execution of the deeds defendant *Sever* paid to the sisters *Clara* and *Mary* each $200, believing that such was a liberal payment in full of the interest of each, and they each received and accepted said sum as the sum which was due them for their interest, relying entirely on their brother as to the sum which was proper and right they should be paid for their interests. That it was a part of the understanding that *Olga* should remain with her brothers and receive a larger sum to be paid at a later date. That in July, 1913, plaintiffs caused some investigations to be made and became convinced that they had not been paid money enough and so claimed to both defendant *Sever* and *Andrew,* and the latter both promised that they would make it right, but neither the plaintiffs nor the said defendants know what their error was nor how much was due the plaintiffs and no more definite demand or promise was made than as stated, and that plaintiffs relied upon such promises. That the payment of the $1,000, including the $300 for her interest in the estate, was made in December, 1913, to the plaintiff *Olga.* That *Sever Nelson* during the entire transactions acted as a fiduciary toward his sisters and mother and they at all times relied upon him and took his word for everything. That neither in 1907 nor in 1912 did either *Sever* or *Andrew* do any intentional wrong, but that the mistake as to a basis for

figuring the present value of the plaintiffs' interests operated as a wrong and fraud upon them, which was not discovered until 1913 and was not known by the defendants before that time. That a wrong was done the plaintiffs in 1907 when the present values of their interests were figured on the 1896 values instead of upon the 1907 values. That defendant *Sever* reported the understanding arrived at to the attorney who had probated the father's estate, who made computation of the then present value of the widow's interest and the respective interests of the heirs upon the values as of 1896, instead of 1907, as the basis of settlement. That it was a part of the understanding in 1907 that the defendants *Sever* and *Andrew* were to take care of the mother, and that they have performed that duty; that the plaintiffs did not delay bringing suit against the defendants to the injury of the defendants; that for a portion of the time the delay is attributable to the promise of *Sever* to make matters right and some delay attributable to the uncertainty they were in as to their rights, and some delay came from war activities.

As conclusions the court found:

That no statute of limitations barred the action and there was no laches on plaintiffs' part; that the receipt of *Olga Darling* of December 7, 1913, was not a bar; that there was no intentional fraud or wrong done by *Sever,* at least prior to the year 1913, but that his mistake in the present value of the plaintiffs' interests, in view of the fiduciary relation he bore to the plaintiffs, operates as a wrong and a fraud upon them entitling them now to relief in the form of a money judgment to be made a lien upon the premises, subject to the existing mortgages, homestead, and dower rights of the widow.

That the amount due the plaintiffs *Clara* and *Mary* is to be determined by taking the value of the land in 1907, deducting the indebtedness then existing and the widow's interest in the property, then allowing a one-fifth interest to each heir, adding to it one fifth of the value of the personal

property (which by the findings was determined to have passed to the defendants in 1907), and then substracting the $200 paid and computing interest on the same from July, 1913.

A similar provision as to the amount due the plaintiff *Olga,* except that the deduction be $300 instead of $200, and computing interest from December, 1913. No costs were allowed either party, except the defendants to pay the balance of the clerk's fees.

The judgment entered in accordance with the said findings provided:

(1) That the plaintiff *Olga Darling* do have and recover from the defendants *Sever Nelson* and *Andrew Nelson* the sum of $752.68.

(2) That the plaintiff *Clara* do have and recover from the defendants *Sever Nelson* and *Andrew Nelson* the sum of $903.16.

(3) The plaintiff *Mary Dobbie* the same as the plaintiff *Clara Smith.*

(4) That the title to the homestead forty acres is adjudged to be in the defendant *Sever Nelson,* subject to the homestead rights of the widow.

(5) That the title to the remaining 120 acres is adjudged to be in the defendants *Sever* and *Andrew Nelson* in equal undivided shares, subject to the dower rights of the widow.

(6) That the aforesaid judgments in favor of the plaintiffs are a lien upon the lands, subject to the mortgages, homestead and dower rights.

From the judgment so entered the defendants have appealed.

For the appellants there was a brief by *E. F. Kileen* of Wautoma and *Goggins, Brazeau & Goggins* of Grand Rapids, and oral argument by *Mr. Kileen* and *Mr. Theo. W. Brazeau.*

For the respondents there was a brief by *Gad Jones* of Princeton and *Lehner & Lehner* of Oconto Falls, and oral argument by *Mr. Philip Lehner* of Princeton and *Mr. Jones.*

The following opinion was filed March 9, 1920:

ESCHWEILER, J. The court below found, and under the testimony in the record before us there is ample support for such finding, that the claim of the plaintiffs that there was an intentional fraud perpetrated upon them either in 1907 or 1912 by the defendants, or either of them, was not in accordance with the facts, and in effect that the understanding of the parties was that all of the real estate, instead of but eighty acres thereof, should be conveyed to the defendants and in accordance with the terms of the various deeds. The title thus conveyed by such respective deeds of 1907 and 1910 was expressly confirmed by the judgment herein.

These findings and the judgment entered thereupon negative the existence of facts upon which could be predicated the equitable relief which was the substance of the prayer in plaintiffs' complaint. The court found facts as the basis for, and thereupon gave plaintiffs, a judgment which was in form, substance, and effect for money damages alone and not for equitable relief.

The right to such legal damages as were thus adjudged by the court sprang into being, if ever, in 1907 at the time there was made the mistake in estimating the amount to be paid the respective plaintiffs for their interests in the real estate. It came into being, if at all, when, pursuant to the agreement, the conveyances of the real estate were made for a consideration the amount whereof was computed at a lesser amount than it should have been. The only right plaintiffs had after the delivery of the deeds which were intended to and did convey all the interest of plaintiffs in the real estate was to demand from defendants larger amounts of money than those paid. It was a then present right to have more money, was due then, arose then and not afterwards.

Being, therefore, but a money demand, it became then subject to the provisions of sub. (3), sec. 4222, Stats., prescribing six years as the limit of the period within which

an action might be brought for the recovery upon such an obligation, and it was barred long prior to the commencement of this action.

That the parties remained in ignorance of the alleged mistake in computation and of their possible rights in the matter until 1913 did not prevent the application of the statute of limitations above mentioned nor bring them within sub. (7) of the same statute, providing for the commencing of the running of the six years from the time only of the discovery of the fraud for which relief may be had in certain equitable actions. *Jacob v. Frederick,* 81 Wis. 254, 51 N. W. 320; *Pietsch v. Milbrath,* 123 Wis. 647, 659, 101 N. W. 388, 102 N. W. 342; *State v. C. & N. W. R. Co.* 132 Wis. 345, 361, 112 N. W. 515; *Ott v. Hood,* 152 Wis. 97, 100, 139 N. W. 762; *Stahl v. Broeckert,* 170 Wis. 627, 176 N. W. 66.

It is further suggested that inasmuch as there was no specific reliance upon the statute now made the basis of the present disposition of this matter by pleading it in the court below, defendants cannot now take advantage of the same.

The defendants, however, had no proper opportunity nor then need of asserting their reliance upon such statute in the court below. The plaintiffs asked only for relief proper in an action in equity. The court denied them such relief and of his own motion gave them that which would be proper in an action at law. This, therefore, is the first opportunity the defendants have had to assert such statute, and they are entitled to its benefits. It follows, therefore, that the judgment awarding money damages to the plaintiffs as against the defendants must be vacated and set aside because barred by the statute of limitations and the complaint be dismissed.

By the Court.—The judgment so far as awarding money damages to the plaintiffs is reversed, and the cause remanded with directions to dismiss the complaint.

A motion for a rehearing was denied, with $25 costs, on May 4, 1920.

YOUGHIOGHENY & OHIO COAL COMPANY and another, Respondents, vs. LASEVICH, Respondent, and INDUSTRIAL COMMISSION OF WISCONSIN, Appellant.

UNION REFRIGERATOR TRANSFER COMPANY, Respondent, vs. KRSIAK, Respondent, and INDUSTRIAL COMMISSION OF WISCONSIN, Appellant.

February 13—May 4, 1920.

War: Alien enemies: Custodian of alien property: Party to litigation involving property of alien enemy: Workmen's compensation: Action to review award: Adverse party.

1. The party in whose favor an award is made by the industrial commission is an "adverse party" within sec. 2394—19, Stats., requiring the "adverse party" to be made a defendant in an action against the industrial commission to review its orders and awards.
2. The alien property custodian appointed by the President under the act of October 6, 1917, as amended March 28, 1918, and November 4, 1918, prohibiting trading with the enemy, is vested with the interest and qualified title to the moneys and property of the enemy to the exclusion of such enemy.
3. Said alien property custodian is a necessary party to actions involving the property acquired by him, he being the government's representative to protect its rights and those of the alien enemy; and in an action to review an award made by the industrial commission to nonresident alien enemies he is an "adverse party" under sec. 2394—19, requiring an adverse party to be made a defendant to such action.

APPEALS from orders of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeals were from orders overruling demurrers of the defendant *Industrial Commission.*

In both cases the *Industrial Commission* made awards under the workmen's compensation act to widows of men accidentally killed in the course of their employments and ordered that such awards be paid to the alien property custodian. In each case the employing companies brought action to set aside the awards of the *Commission* on the

grounds that it had acted in excess of its powers in entering awards against the plaintiffs for the reason that the widows to whom the awards were made were at all times in question nonresident alien enemies and therefore unable to institute or maintain the actions. The *Industrial Commission* demurred to the complaints on the ground that it appears on the face thereof that there is a defective party defendant by reason of the omission of Francis P. Garvin, alien property custodian.

The trial court found that the alien property custodian has no beneficial interest in the amount of the awards and that his only duty is to serve as a depositary for the amounts awarded until such time as they may be paid to the applicants, and that the alien property custodian is not an adverse party within the meaning of the statute requiring the adverse party to be made a party defendant in an action to set aside an award of the *Industrial Commission.*

Orders were entered overruling the demurrer in each case. An appeal was taken from each of such orders.

For the appellant there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the plaintiff respondents there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

William H. Timlin, Jr., of Milwaukee, as *amicus curiæ.*

The following opinion was filed March 9, 1920:

SIEBECKER, J. It is provided by statute that orders and awards of the *Industrial Commission* are reviewable only by action against the *Commission* if commenced within twenty days, "in which action the adverse party shall also be made defendant." Sec. 2394—19, Stats. The party in whose favor the award is made is an adverse party in such an action. *Gough v. Industrial Comm.* 165 Wis. 632, 162 N. W. 434.

The question arises, Is the alien property custodian appointed by the President of the United States under the trading with the enemy act of October 6, 1917 (amended March 28, 1918, and November 4, 1918), a necessary party within the contemplation of the Wisconsin statute above referred to? The demurrer was overruled on the ground that the alien property custodian has no beneficial interest in the award. As indicated in the foregoing statement, the *Industrial Commission* made the awards in these cases payable to such custodian, to be held by him and to be administered and accounted for as provided by law. It is unquestioned that this act of Congress was a proper exercise of its powers in time of war. *Fischer v. Palmer,* 259 Fed. 355, and cases cited.

The act provides for the appointment of the property custodian by the President. The various provisions of the act prescribe for the care, custody, and administration of the property, and regulate property rights of enemies and their allies in the United States pending the war, and declare, among other things, that

"All moneys paid to or received by the alien property custodian pursuant to this act shall be deposited forthwith in the treasury of the United States. . . . After the end of the war any claim of any enemy . . . to any money or other property received and held by the alien property custodian or deposited in the United States treasury shall be settled as Congress shall direct." Barnes, Federal Code, 1919, § 10212.

It is declared in Senate Report No. 113 concerning this act:

"The most novel and important feature of this portion of the bill [the conservation and utilization of enemy property during the war] is the requirement that all money and quick assets paid over to the government shall be invested in United States bonds. . . . By this means enemy property is temporarily conscripted by the government to finance the government through investment in these bonds, and to be

paid back to the enemy or otherwise disposed of at the end of the war, as Congress shall direct."

We cannot doubt that these purposes of the act are fully accomplished by its provisions and that the alien property custodian, under his appointment by the President, became vested with an interest and qualified title to the moneys and property. He thus acquired substantial rights and interests to the exclusion of the enemy. This conclusion is also sustained by the fact that the alien enemy cannot sue in the courts of this country to enforce his rights to such property unless Congress shall confer on him this privilege in the final disposition of such property. The various provisions of the act, in connection with the powers conferred by the President on the alien property custodian, clearly vest in this official such right and interest in alien enemy property, which makes him the representative of the government to protect its rights and those of the alien enemy in litigation where such property is involved. This makes him a necessary party to these actions and an adverse party within the contemplation of the provisions of sec. 2394—19, Stats.

The demurrers were improperly overruled.

By the Court.—The orders appealed from overruling the demurrers for defect of parties are reversed, and the causes remanded with direction that orders be entered sustaining the demurrers.

A motion for a rehearing in each of the above cases was denied, with $25 costs, on May 4, 1920.

GOODWIN, Administrator, and others, Appellants, vs. VON COTZHAUSEN and others, Respondents.
SAME, Respondents, vs. SAME, Appellants.

March 13—May 4, 1920.

Corporations: Dissolution at suit of minority stockholder: Evidence: Loss of profits: Liability of corporate officers for mismanagement: Finding of referee: Review by court: Parties entitled to costs and attorney fees.

1. Where a corporation has been plundered by its officers or so mismanaged as to bring it to the verge of bankruptcy, threatening minority stockholders with the loss of their investment, and it seems certain that the purposes for which the corporation was organized are no longer attainable, and there is no other adequate remedy, a court of equity, in the exercise of its inherent power, will appoint a receiver, wind up the affairs of the corporation, distribute its assets, and decree a dissolution at the suit of a minority stockholder.
2. In an action for the appointment of a receiver for a lithographing company brought by minority stockholders on the ground of mismanagement by its president and general manager, the evidence is *held* to support a finding that the corporation could no longer be operated under the domination of such president except to its own ruin and the loss to the stockholders of their entire investment, and that a sale of the assets and the winding up of its affairs should be had.
3. Where a referee recommended the allowance of a certain amount of general damages based upon past profits of the business as an established one, it was error for the court to reduce the amount so recommended, where there was ample evidence to sustain the referee's finding and no clear preponderance against it.
4. A corporate officer may be held liable for profits lost by his mismanagement, and past profits of an established business constitute a legitimate basis on which to estimate future profits of the same business, properly managed, which were not realized because of defendant's mismanagement.
5. Where in a minority stockholder's suit for a receivership and dissolution of a corporation other minority stockholders are joined as plaintiffs by order of the court, and such other plaintiffs have rendered valuable services in conserving and saving the fund for the benefit of all the stockholders, they are as much entitled to compensation out of the fund reserved for attorneys' services and expenses as the original plaintiff.

APPEALS from an interlocutory decree of the circuit court for Milwaukee county: MARTIN L. LUECK, Judge. *Modified and affirmed.*

This action was commenced in June, 1915, by the plaintiff *H. W. Goodwin,* as administrator of the estate of J. Arthur Davis, deceased, and *F. B. Thomas,* minority stockholders of the *Milwaukee Lithographing Company,* against the *Milwaukee Lithographing Company* and *Alfred von Cotzhausen,* its president, general manager, and treasurer, and other officers, for the appointment of a temporary and permanent receiver for said corporation to take charge of all its property and assets and to administer the same pending the determination of this suit, and for the restitution of funds alleged to have been unlawfully abstracted therefrom by the said *von Cotzhausen* and other officers and directors of the corporation. The suit was brought by plaintiffs on their own behalf and on behalf of all other stockholders similarly situated. Thereafter petitions were made by *Edgar A. Goetz* and Lillie A. Brosius, also minority stockholders, and they were made parties plaintiff, and they served separate supplemental complaints and a joint second supplemental complaint, demanding a winding up of all the business, property, and affairs of the *Milwaukee Lithographing Company,* a conversion thereof into cash, to be applied to the payment of debts and then distributed among the stockholders.

Upon motion made October 9, 1915, a receiver was appointed March 9, 1916, who took charge of the property, business, and affairs of the said *Milwaukee Lithographing Company* and continued to administer the same until the entry of the judgment herein.

On June 29, 1916, the case was referred to the Hon. Max W. Nohl, court commissioner, to hear, try, and determine. In due course he made and filed his findings of fact and conclusions of law, in which he found that the *Milwaukee Lithographing Company* was organized June 7, 1902, with an authorized capital stock of $100,000, divided

into 1,000 shares of $100 each; that by amendment of its articles of incorporation on the 28th day of April, 1910, its capital stock was increased to $250,000, divided into 2,500 shares of $100 each, and that at the time of the commencement of this action there were issued 1,867 shares of said stock, of which 677 shares were owned by *von Cotzhausen* and 600 shares by the *American Fine Art Company,* a corporation controlled and dominated by the said *von Cotzhausen;* that from its organization to the 29th day of August, 1913, J. Arthur Davis was its president and general manager; that from August 29, 1913, to March 9, 1916, *von Cotzhausen* was the president and general manager thereof; and that from September 30, 1910, to March 9, 1916, the said *von Cotzhausen* was treasurer thereof.

That the *Milwaukee Lithographing Company,* from the time of its organization up to the time that *Alfred von Cotzhausen* became active in the control of it, in the year 1913, was a prosperous concern; that the gross sales made, net profits made, losses sustained, dividends paid, and the surplus at the end of each fiscal year of said corporation, from the time of its organization down to March 9, 1916 (the time at which the receivers were appointed in this case), according to the company's books, were as follows:

Year.	*Sales.*	*Profits.*	*Losses.*	*Dividends.*
1903	$138,583 50	$12,361 24	Loss	$3,354 28
1904	143,036 27	8,054 90		5,011 12
1905	169,317 88	9,531 23		6,467 99
1906		22,913 49		3,595 62
1907	215,864 33	30,785 12		16,232 50
1908	192,101 79	13,649 92		30,200 00
1909	255,993 53	32,766 17		21,690 00
1910	250,823 00	27,532 63		1,010 00
1911	297,692 08	39,794 62	Cash	25,215 67
			Stock	50,666 00
1912	310,697 23	45,465 50		22,404 00
1913	289,192 93	11,617 64		
1914	164,508 45		$21,260 85	
1915				
To July 12	25,783 27		21,212 36	
To Nov. 12	15,086 94		8,379 72	
To March 9			22,772 92	

That by various schemes and devices the said *Alfred von Cotzhausen,* from the year 1911 down to the appointment of the receiver herein, fraudulently, corruptly, and unlawfully diverted various sums of money from the said *Milwaukee Lithographing Company* and appropriated the same to his own use, which, with interest thereon up to the time of the entry of judgment herein, approximated $60,000; that from on or about the 1st day of January, 1911, the said *Alfred von Cotzhausen* did not faithfully or properly perform his duties as an officer, director, and employee of the said *Milwaukee Lithographing Company* or as manager thereof; that he, on the contrary, carelessly, negligently, and recklessly failed to properly manage the business and affairs of the said *Milwaukee Lithographing Company* and failed to perform his duties as an officer, director, and manager from such date down to the appointment of the receivers herein on March 9, 1916; that he was inattentive to his duties and mismanaged the said corporation's business, property, and affairs; that by reason and in consequence of such carelessness, negligence, recklessness, failure, mismanagement, and inattention to the proper performance of his duties as an officer, director, manager, and employee of the said *Milwaukee Lithographing Company,* the said company was caused financial losses in the sum of $60,000, which losses the referee finds that the *Milwaukee Lithographing Company* sustained by reason of such careless, negligent, and reckless conduct and management, in addition to the specific abstractions before referred to; that the business of said company at the time the said *von Cotzhausen* became actively connected with it was a well-regulated, steady, and constant business, not subject to other than ordinary fluctuations, which ordinary fluctuations could, with ordinarily careful management, be overcome to such an extent as to prevent the diminution of the average yearly profits; that from the time said *Alfred von Cotzhausen* became so

actively connected with said company he could and should have conducted the business thereof in substantially the same manner in which it had been conducted theretofore and with like good results.

That at the time of the commencement of this suit and ever since, the said *Milwaukee Lithographing Company* was and now is in grave and imminent danger of ruin and insolvency; that the defendant *Alfred von Cotzhausen* for many years last past had and still has the reputation among the trade and business in which the *Milwaukee Lithographing Company* is engaged, as being unreasonable, unreliable, dishonest, and litigious, and as being a dangerous man to deal with; that he is an unfit, an improper, and incompetent person to have the management or control or to be an officer, director, agent, or employee of the said *Milwaukee Lithographing Company* or any of its business or to be actively interested in or identified with it; that by reason of his said bad reputation, his personal character, his general unfitness, and his known ownership of the majority of the stock of the *Milwaukee Lithographing Company,* the said company cannot safely or profitably continue in its said business; and that by reason of the things found by the referee and of differences existing between the stockholders of the said *Milwaukee Lithographing Company* continuance in business by the said company is impracticable and would be ruinous; that continuance in business would result in the stockholders thereof quickly losing the assets of the said corporation; that the wasting of the assets of the said corporation would soon result in insolvency; that there is no prospect of said corporation succeeding as a going concern; that *Alfred von Cotzhausen's* future active connection with said corporation would result in its being completely ruined; that the best interests of all stockholders, creditors, and persons interested in the said corporation require that all the assets, property, and effects thereof as they now exist or as

they may hereafter exist, including its good will, be sold and that the affairs of the corporation should be wound up at the earliest possible moment; that there is no other adequate remedy to protect the stockholders; that the accomplishment of the object for which the company was organized is no longer possible, and that it would be to the best interest of all parties concerned that there should be sold to the highest bidder all of the assets, property, effects, and good will of the *Milwaukee Lithographing Company*. The referee also found that none of the other officers or directors of the *Milwaukee Lithographing Company* were guilty of any malfeasance, misfeasance, or nonfeasance and were not liable in the action.

As conclusions of law the referee found that the *Milwaukee Lithographing Company* should have judgment against the said *Alfred von Cotzhausen* for the various sums unlawfully abstracted from the company and appropriated to his own use, aggregating upwards of $60,000, and for the additional sum of $60,000 for the loss of profits and damage to the business as a result of mismanagement of the affairs of the corporation, and that a sale of all the assets, property, effects, and good will of the *Milwaukee Lithographing Company* be decreed, such sale to be conducted in the manner set forth in the findings.

The circuit court modified the report of the referee by substituting $30,000 for $60,000, the amount of damages found by the referee to have been sustained by the company because of loss of profits and business resulting from the mismanagement thereof by the said defendant *Alfred von Cotzhausen,* and entered judgment in the nature of an interlocutory decree confirming the report in all other material particulars, by which judgment was rendered against *Alfred von Cotzhausen* and in favor of the *Milwaukee Lithographing Company* for the various sums found to have been unlawfully abstracted and appropriated to his own use, aggregating approximately $60,000, and for the further sum of

$30,000 as damages resulting from loss of profits and business due to the mismanagement thereof by the said *Alfred von Cotzhausen.*

From the judgment so entered the defendant *Thomas* appealed from certain portions thereof, but the appeal was dismissed upon the argument of the case and requires no further consideration.

The defendants *Alfred von Cotzhausen* and *Friedericke Bode* appealed from the whole and every part of the judgment.

The plaintiff *H. W. Goodwin,* as administrator with the will annexed of the estate of J. Arthur Davis, deceased, appealed from the part of the interlocutory decree directing the recovery from the defendant *Alfred von Cotzhausen* of the sum of $30,000 instead of $60,000, and from so much of the said interlocutory decree as adjudges and determines that the plaintiffs *Brosius* and *Goetz* should have their just and reasonable compensation for their attorneys' services and other expenses incurred in this action and for the subsequent costs and disbursements as adjudged in paragraph 18 of the interlocutory decree.

For the plaintiff *Goodwin* there was a brief by *Arthur J. Pellette* and *Glicksman, Gold & Corrigan,* all of Milwaukee, and oral argument by *Mr. Nathan Glicksman* and *Mr. Pellette.*

For the plaintiffs *Goetz* and *Brosius* there was a brief by *Austin, Fehr, Mueller & Gehrz* and *Arthur Breslauer,* all of Milwaukee, and oral argument by *Mr. Breslauer.*

Alfred von Cotzhausen of Milwaukee, *in pro. per.*

Arthur von Cotzhausen of Milwaukee, for the defendant *Bode.*

For the defendants *Clara Mueller, Laura Cotzhausen,* and *Louis Cotzhausen* there was a brief by *Schmitz, Wild & Gross* of Milwaukee, and oral argument by *Robert Wild.*

For the defendant *Marshall & Ilsley Bank* the cause was argued orally by *C. W. Reeder* of Milwaukee.

OWEN, J. We have for consideration questions raised by the appeals of *Alfred von Cotzhausen, Friedericke Bode,* and *H. W. Goodwin.* Separate briefs were filed by *Alfred von Cotzhausen* and *Friedericke Bode.* Neither brief contains any assignment of error, nor is any finding of fact challenged in either brief. While it is to be gathered from the brief of the appellant *Alfred von Cotzhausen* that he is dissatisfied with the findings and with the judgment in general, there is no efficient challenge of any particular finding, nor is there any reference in the brief to any evidence in the record, or in the printed case prepared upon the appeal of *H. W. Goodwin* (which is the only case prepared by any of the appellants), to impeach the findings made by the referee and confirmed by the court. The record in the case is exceedingly voluminous, consisting of over 6,000 pages of typewritten matter and six large boxes of exhibits, and a general examination thereof for the purpose of verifying the findings of the referee cannot be undertaken. Under the circumstances, therefore, the findings of fact must be regarded as conclusive upon the appellants *Alfred von Cotzhausen* and *Friedericke Bode.*

We may, however, consider the question of whether the judgment or interlocutory decree from which the appeal is taken is warranted by the findings. The appellants *Bode* and *von Cotzhausen* assail that part of the interlocutory decree which provides for a sale of the assets of the corporation, a distribution of the proceeds among the creditors and stockholders, and a winding up of its affairs. This is the vital question in the case as it is submitted.

It is contended that a court of equity has no power or jurisdiction, at the suit of a minority stockholder, in the absence of statutory authority, to appoint a receiver for a corporation and wind up its affairs. That such was the well-nigh universal rule until a comparatively recent date cannot be doubted. This rule had its origin at a time when corporations were created by special charters the grants of

which conferred valuable and exclusive franchises upon their grantees, and it was considered that, as the franchises were granted by the state, they could be vacated or forfeited only in a proceeding by the state; that their lives depend upon the action of the state or the stockholders as a whole. The reason for this rule has entirely ceased in respect to the ordinary business corporation formed under general laws, the privileges conferred upon which are open to all who comply with statutory conditions, which conditions are simple and formal in character and may readily be complied with by any who desire to associate themselves for the prosecution of any business venture. The ordinary business corporations are not organized for the purpose of performing any public function and the state has no particular interest in them. It is only those who invest their money in them as stockholders or bondholders, and creditors thereof, who have a substantial interest in their proper management and business success. True, statutory regulations exist, but such regulations are enacted for the benefit and protection of those financially interested in the corporation and not for the protection of the state. The passing interest of the state in their continuance is well illustrated by the fact that a dissolution of the corporation automatically follows upon its failure to file certain reports in the office of the secretary of state. Sec. 1774*a*, Stats. If the corporation were an institution in which the state had a special interest, its life would not be so summarily snuffed out for its mere failure to report the names and addresses of its officers to a public official.

The trend of modern decisions is in recognition of this growing distinction between the present and the original corporation, and there is now a respectable array of judicial authority to the proposition that where a corporation has been plundered by its officers, or they have so mismanaged its affairs as to bring it to the verge of bankruptcy, threatening the minority stockholders with loss of their in-

vestment, and it seems certain that the purposes for which the corporation was organized are no longer attainable, and there is no other adequate remedy, a court of equity, in the exercise of its inherent power, will appoint a receiver for the corporation, wind up its affairs, distribute its assets, and decree a dissolution thereof at the suit of a minority stockholder. *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 53 N. W. 218; *Red Bud R. Co. v. South,* 96 Ark. 281, 131 S. W. 340; *Gibbs v. Morgan,* 9 Idaho, 100, 72 Pac. 733; *Riley v. Callahan M. Co.* 28 Idaho, 525, 155 Pac. 665; *Thwing v. McDonald,* 134 Minn. 148, 158 N. W. 820; *Phinizy v. Anniston City L. Co.* 195 Ala. 656, 71 South. 469; *Brent v. B. E. Brister S. Co.* 103 Miss. 876, 60 South. 1018; *Exchange Bank v. Bailey,* 29 Okla. 246, 116 Pac. 812; *Metropolitan F. Ins. Co. v. Middendorf,* 171 Ky. 771, 188 S. W. 790. In the above cited cases the principle was either applied or recognized that where the officers and directors, or majority stockholders, exercising exclusive management and control over a corporation, have abused their power and proved recreant to their trust by fraudulently conducting the affairs of the company so as to appropriate to themselves the profits and property thereof, to the detriment of the minority stockholders, and the corporation is on the verge of bankruptcy, and the attainment of the purposes for which it was organized is no longer possible, and there is no other adequate remedy for the protection of the minority stockholders, a court of equity may, at the suit of a minority stockholder, appoint a receiver for the property of the corporation, decree a winding up of its affairs and a dissolution of the corporation itself.

The fading analogy between the present business corporation and the corporation as originally conceived, was recognized by this court in *Katz v. De Wolf,* 151 Wis. 337, 138 N. W. 1013, where it was said:

"The development of corporation law began with a strictness of analogy between municipal and stock corporations

which is no longer fully observed. The change from the ancient mode of creating corporations by special act to permit organizations by public declaration or contractual undertakings acknowledged and filed in a public office, and the great multiplication of corporations thereunder, caused some further change. There is unquestionably a broad power of equity applicable wherever wrong is shown of such a nature as to arouse the equitable jurisdiction."

While that case did not present a situation calling for the exercise of the power, the language quoted forecast the opinion of this court with reference to its existence as well as its disposition to the exercise thereof. We agree with the Idaho court that

"The early doctrine that the affairs of a corporation could not be inquired into except by permission of the attorney general, and that courts of equity should not interfere with the power and authority of the directors of a corporation because that would result in its dissolution, has been modified to meet existing conditions. A large part of the business of the world is done through corporations, and . . . courts of equity should adapt their practice as far as possible to the existing state of society, and apply their jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and should not, from too strict an adherence to the forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy." *Gibbs v. Morgan, supra.*

The power, however, is one to be exercised with great caution. It is inherent in the nature of corporations that the affairs thereof are to be managed and directed as willed by the majority of the stockholders. Their decisions within the scope of legitimate discretion cannot be interfered with, and even though, in the opinion of the minority, the policies adopted by the majority are not for the best interests of the corporation, nevertheless they must accept such decisions and acquiesce therein. They cannot complain thereof unless they be prompted by fraud and bad faith, resulting in

the spoliation of the minority stockholders and ruin to the corporation.

With this understanding of the power of the court in the premises, let us consider the record in this case with a view of determining whether the circumstances here disclosed present a proper situation for the exercise of this power.

The tabulation set forth in the statement of facts showing the course of business of the company from the year 1913 down to the appointment of the receiver March 9, 1916, shows that up to the year 1913, the year during which the defendant *von Cotzhausen* acceded to the presidency and general management thereof, the company did a thriving business, earned handsome profits, and paid gratifying dividends. In the year 1912 the company made profits of $45,465.50. In 1913 they dwindled to $11,617.64. In 1914 there were losses of $21,260.85. The losses during 1915, up to November 12th, were $29,592.08, and from November 12, 1915, to March 9, 1916, there were further losses of $22,772.92. The amount of sales in 1912 was $310,697.23. In 1914, the first full year of management by *von Cotzhausen,* the sales were $164,508.45, a dropping off of nearly fifty per cent. The first six months of 1915 the sales were only $25,783.27, and from July 12th to November 12th of the same year the amount of sales was $15,086.94. This shows an amazing decrease in the business and indicates that in but a short time the business would be practically nil. One marvels at the possibility of such a slump in such a short time, but the record furnishes ample evidence for the reason thereof.

When *von Cotzhausen* assumed management of the company there was a well organized sales force. There was a general sales agent on the Pacific coast, one in New York, one in New Orleans, and two in Chicago. These sales agents were procuring the business for the company. Good business judgment would plainly require a continuance of

cordial relations between these sales agents and the company and a retention of their services. The evidence discloses, however, that *von Cotzhausen* immediately proceeded to get into a row with all these men and made it so disagreeable for them that they quit the service of the company. The services of one Frank W. Wentworth of Chicago appear to have been particularly valuable to the company. With reference to him the referee finds:

"That Frank W. Wentworth became connected with the *Milwaukee Lithographing Company* in 1902, soon after the organization of said company, first as agent, and later as the agent, representative, and manager at Chicago of said company, and as such controlled the so-called Wrigley business; that he continued as such agent, representative, and manager until April 17, 1914, when said Wentworth severed his connection with said company; that during the year 1910 the said company shipped goods, the orders for which were obtained by Wentworth, in the amount of $103,171.30; in 1911, $186,121.35; in 1912, $151,470.81; in 1913, $132,531.63; or a total of $573,295.09; that the total business of said company during said four years aggregated $1,355,595.99; that after said April 17, 1914, the whole of said Wrigley business was withdrawn by said Wentworth from and lost to the said company; that as a result of such withdrawal and loss the successful operation of said company as a profitable business enterprise was greatly impaired."

Instead of maintaining satisfactory arrangements with the said Frank W. Wentworth, *von Cotzhausen* started an action against him to recover for the company $36,000 which he claimed Wentworth owed to it for overcharges, which the referee finds to have been unfounded, resulting in the loss of Wentworth's services and the business which he secured for the company.

This furnishes but a glimpse of the real character, attitude, and diplomacy of the said *von Cotzhausen* and is but a small part of the evidence which justifies the finding of the referee "that the defendant *Alfred von Cotzhausen* for

many years last past had and still has the reputation among the trade and business in which the *Milwaukee Lithographing Company* is engaged, as being unreasonable, unreliable, dishonest, and litigious, and as being a dangerous man to deal with."

There are unpaid judgments against the company amounting to $12,557.11, together with accrued interest, and it owes the *Marshall & Ilsley Bank* $17,500. While this would not be a forbidding indebtedness for a going concern of the size of the *Milwaukee Lithographing Company,* it is nevertheless a serious matter in view of the fact that the company was running at a loss for more than two years preceding the appointment of the receiver.

We cannot escape the conclusion that this company can be no longer operated under *von Cotzhausen's* domination and control except to its own ruin and the loss by the stockholders of their entire investment. The purposes for which the company was organized are no longer possible of accomplishment, and the only rational thing to do is to wind up its affairs and save the stockholders from further loss: from which it results that that feature of the interlocutory decree providing for a sale of the assets of the company and a winding up of its affairs should not be disturbed.

The appellant *Goodwin* complains because the court reduced the amount of general damages, found by the referee to have been $60,000, to $30,000. In *Huebner v. Huebner,* 163 Wis. 166, 157 N. W. 765, it was said:

"The rule is well established in this court that past profits of an established business constitute a legitimate basis upon which to estimate the future profits of the same business conducted in the same manner, and that in a proper case such future profits may be recovered when the plaintiff has been prevented from making them by the wrongful conduct of the defendant."

We know of no reason why that principle is not applicable to the instant case. It is settled by the decisions of this

court that where there is ample evidence to support a referee's findings of fact and no clear preponderance against them, the trial court is not justified in setting them aside. *Erickson v. McGeehan C. Co.* 107 Wis. 49, 82 N. W. 694; *Ott v. Boring,* 139 Wis. 403, 121 N. W. 126; *Wojahn v. Nat. Union Bank,* 144 Wis. 646, 129 N. W. 1068. The evidence to which our attention has been called clearly sustains the amount of damages as found by the referee. If there is any evidence whatever against this finding it has not been pointed out to us, and our conclusion is that the trial court was not warranted in reducing the damages in this respect from $60,000, as found by the referee, to $30,000. The interlocutory decree should therefore be modified by substituting $60,000, the amount found by the referee for general damages, for $30,000, the amount thereof as fixed and determined by the trial court.

By the interlocutory decree it is adjudged that the plaintiffs *Brosius* and *Goetz* are entitled to just and reasonable compensation for their attorneys' services and other expenses paid or incurred in this action and that the amount thereof should be determined by the court or referee after the sale of the property and effects of the company has been made and the affairs of the company liquidated before the final decree shall have been entered herein, to be paid out of the corporate assets of the *Milwaukee Lithographing Company.* Of this provision the plaintiff and appellant *Goodwin* complains, his position being, as we understand it, that, as he originally commenced the action, he is the only party who should be compensated out of the fund conserved for attorneys' services and other expenses. The plaintiffs *Brosius* and *Goetz* were made parties plaintiff by order of the court. Up until such time plaintiff *Goodwin* no doubt had control of the action, but after that time he had no more control thereof than plaintiffs *Brosius* and *Goetz.* Cook, Corp. (7th ed.) 2738–2740. If the plaintiffs *Brosius* and *Goetz* rendered valuable services in the matter of conserving and saving the fund for the benefit of all the stockholders

of the corporation, no reason is perceived why they should not be compensated as well as *Goodwin*. In this connection it should be observed that the amount of their reimbursement or compensation has not been fixed. That is left by the interlocutory decree to be determined by the court or referee after the sale of the property and effects of the company, and at the present time neither the plaintiff *Goodwin* nor any other party interested has anything of which to complain. However, in view of the fact that the question is presented, we think it proper to say that if the court shall determine that the plaintiffs *Brosius* and *Goetz* did render valuable services in the prosecution of the action and that their efforts contributed to the conservation of the fund, it is within the power of the court to provide for their reimbursement in such behalf. No further questions call for consideration.

By the Court.—The interlocutory decree is modified by substituting sixty thousand ($60,000) dollars, for general damages as found by the referee, in lieu of thirty thousand ($30,000) dollars as determined by the trial court, and as so modified is affirmed.

WINSLOW, C. J., and KERWIN and ESCHWEILER, JJ., took no part.

BRUNETTE, Appellant, vs. BRUNETTE, Respondent.

April 6—May 4, 1920.

Master and servant: Injury to servant: Notice of injury: Proceeding under workmen's compensation act as written notice: Industrial commission: Powers: Mistake in remedy.

1. A notice of claim for compensation based upon the statutory right conferred on an injured employee by the workmen's compensation act, and subsequent proceedings before the industrial commission, with actual knowledge to the employer, is not the written notice contemplated by sub. (5), sec. 4222,

Stats., providing that no action to recover damages for personal injuries shall be maintained unless a written notice is served within two years by the injured person upon the person by whom it is claimed the damage was caused.

2. The industrial commission, under the workmen's compensation act, is an administrative body and not a court, having no powers other than those granted it by the statutes of its creation, and no power to certify or send proceedings brought before it to any court or other tribunal.
3. Proceedings brought by an injured servant before the industrial commission under the workmen's compensation act cannot be held to be the situation contemplated by sec. 2836*b*, Stats., under which a party who is mistaken as to his remedy or as to the jurisdiction of the court may have his proceedings certified to some other court which has jurisdiction.
4. Nor can a dismissal of proceedings before the industrial commission be considered in substance or effect as analogous to a nonsuit in a court of proper jurisdiction after which a second suit for the same cause of action may be instituted and the first cause be considered as a substantial compliance with sub. (5), sec. 4222, Stats., requiring notice of a claim for damages to be served within two years on the party causing the injury.

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Affirmed.*

On or about September 15, 1915, the plaintiff while employed by defendant, his brother, as a farm hand on the latter's farm, injured his shoulder in a fall which occurred when he was climbing up through a chute to the upper floor of defendant's barn. The injury interfered with his performing his usual services until the time he left defendant's employ ten days later. He was then examined by a physician, who thereupon notified defendant by letter of the injury. The defendant called at the doctor's office and saw the plaintiff and doctor and was then and there informed of the details of the accident as claimed by plaintiff. On October 4th the defendant reported the accident to the industrial commission, saying as follows:

"No one saw the accident, but the man says he was going up into the hay loft when he fell down to the floor. Party kept on working until Saturday, September 25th, and I

knew nothing of the accident until I got the letter from the doctor telling me about it."

On October 25th the plaintiff was reported by the physician as being cured, and on the 15th day of November, 1915, he was paid by an insurance company on behalf of defendant $65.64, including $37.50 for doctor's bill.

On August 21, 1916, plaintiff was examined by another physician and it was then disclosed that there was an atrophy of the shoulder muscles which results in a permanent substantial impairment in the use of the arm.

On January 18, 1917, the plaintiff made application to the industrial commission for compensation on one of the usual blanks, giving the date of the accident as April, 1916, instead of the correct date, September 15, 1915.

A notice was issued by the industrial commission setting a hearing of said matter for March 2, 1917, which notice was sent by mail, together with a copy of plaintiff's application, and both were received by defendant prior to said March 2d. Defendant appeared on such hearing and denied any injury to the plaintiff in due course of his employment in April, 1915, or at any other time. An examination of its record by the industrial commission disclosed the fact that at the time of the injury in September, 1915, defendant was not then or until November 1, 1915, under the workmen's compensation act. The claim of the plaintiff was thereupon dismissed by the industrial commission.

On March 1, 1918, the summons and complaint herein were served upon the defendant.

Upon the issues framed the jury found that the defendant did not use ordinary care in furnishing a safe place for plaintiff to perform his services; that such want of ordinary care was the proximate cause of the injury; that there was no want of ordinary care and no assumption of risk on plaintiff's part; and assessed his damages at $2,000.

After verdict and upon the several motions made upon the testimony and the pleadings the court granted defend-

ant's motion for judgment on the ground that there had been no compliance by the plaintiff with the provisions of sub. (5), sec. 4222, Stats., which had been asserted as a defense, and dismissed the complaint. From judgment of dismissal the plaintiff has appealed.

For the appellant there were briefs by *Silverwood, Fontaine & McCreery* of Green Bay, and oral argument by *A. B. Fontaine* and *T. P. Silverwood.*

For the respondent there was a brief by *James T. Drought* of Milwaukee, attorney, and *John A. Kittell* of Green Bay, of counsel, and oral argument by *Mr. Drought.*

ESCHWEILER, J. Sec. 4222, Stats., which is the provision prescribing the general limitation for commencing an action within six years after the accrual of the cause thereof, contains in sub. (5) of said section the following provision, which is the only part material for consideration here:

"No action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record. No such notice shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the description of the injuries, the manner in which they were received or the grounds upon which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby; . . . When an action shall be brought and a complaint actually served within two years after the happening of the event causing such damages, the notice herein provided for need not be served."

The plaintiff appellant contends that there has been a substantial compliance on his part with the terms of the above statute as to the giving of notice within the two years subsequent to the injury; or else that defendant should be held estopped by his conduct from relying upon that statute; and lastly, that in any event the bringing of the proceedings in January, 1917, for compensation before the industrial commission is in effect the bringing of an action and serving of a complaint within the last sentence of the above quoted portion of sub. (5), sec. 4222, Stats.

Plaintiff's right to recover, if at all, in this action is not founded upon the breach by defendant of any of the statutory provisions relating to master and servant, but solely for an alleged breach of the common-law duty of the defendant to furnish plaintiff a reasonably safe place to work.

The right to compensation for industrial injuries under the workmen's compensation act, secs. 2394—1 to 2394—32, inclusive, is purely a statutory right as distinguished from the common-law right. Although many of the cases in which compensation is allowed under this act involve situations in which there is at the same time a breach by the employer of his common-law duties and obligations towards his employee and for which identical injuries the employee might have, except for this act, a valid ground for recovery of consequent damages at common law, nevertheless the theory and purpose of the compensation act is to make up as nearly as possible to him who has been injured in an industrial pursuit the consequent loss to him irrespective of any questions as to negligence as defined at common law.

A notice, therefore, of the claim for compensation based upon the statutory right conferred on the injured employee by the workmen's compensation act is a distinct and different claim and demand than one made for damages for an alleged breach by and the consequent liability of the employer under the principles of the common law.

The defendant had actual knowledge from the interview

with the plaintiff and his doctor after the injury and before October 2, 1915, at which time defendant made his report of the accident to the industrial commission, of the time and place and manner of the injury, but that situation, together with the subsequent proceedings and notices before the industrial commission, cannot be considered as a substitute for the essential conditions under sub. (5) of sec. 4222, Stats., above quoted, of a written notice signed by the person injured or on his behalf, stating the ground upon which claim is made and that satisfaction thereof was claimed of the defendant.

Neither can the receipt signed by plaintiff in November, 1915, at the time he was paid compensation on behalf of defendant by the insurance company, be considered as in any wise supplying this want, or aiding, with the other writings before the industrial commission, including defendant's own report of October 2, 1915, in making a substitute for a notice that a claim was intended to be made against the defendant on the entirely distinct ground of an alleged breach of his common-law duty. *Staszczuk v. Gilman M. Co.* 159 Wis. 615, 150 N. W. 982.

There having been nothing, therefore, in the record which could be construed in any manner as a compliance with the provision as to giving of a written notice to defendant with reference to this injury within the purview of the statute above quoted, it necessarily follows that there is no application for the rule as to a waiver of the giving of any such notice, as in such cases as *Guile v. La Crosse G. & E. Co.* 145 Wis. 157, 170, 130 N. W. 234, where it was found by the jury that express representations were made by defendant's officers that no further notice of the injury than that which they already had was necessary; or of *Maurer v. Northwestern Iron Co.* 151 Wis. 172, 138 N. W. 636, where there was an express admission of the receipt of an informal notice and a statement that no further notice would be necessary.

The court expressly stated in his written decision disposing of the motions after verdict that there was no evidence of any representation made by defendant to plaintiff that he need serve no notice of injury in order to preserve his rights in this regard, and such conclusion is fully warranted by the record. There is nothing that could be reasonably construed as fraud or deceit on the part of the defendant tending to lull the plaintiff in any manner into the belief that the statutory prerequisites to his right to claim damages on the ground of the alleged breach of the common-law duty of defendant towards him were being waived. *Smith v. C., M. & St. P. R. Co.* 124 Wis. 120, 102 N. W. 336. See, also, *Uhlenberg v. Milwaukee G. L. Co.* 138 Wis. 148, 151, 119 N. W. 810.

The plaintiff appeared by attorneys before the industrial commission in the proceedings started by him in January, 1917. There still existed the period between the dismissal thereof in March and September 15, 1917, the two years subsequent to the injury, within which timely notice might have been given or action commenced, by either of which methods plaintiff's rights might have been preserved as against the conditions prescribed in sub. (5), sec. 4222, Stats., *supra*. Nothing was done, however, by plaintiff or on his behalf in this interim other than possibly some general conversations between the attorneys of the respective parties, and defendant cannot be charged with plaintiff's failure to take either of such steps during that interval.

The industrial commission, under the workmen's compensation act, is an administrative body and not a court. It has no powers as such body other than those granted it by the statutes of its creation, and it has no power of certifying or sending proceedings brought before it to any court or other tribunal.

The proceedings, therefore, brought before it cannot be held to be the situation contemplated by sec. 2836*b*, under which, when it appears to a court that a party claiming

affirmative relief or damages has mistaken his remedy, his proceeding or action shall not be finally dismissed or quashed, but he shall be allowed a reasonable time within which to amend, or, in case the court has no jurisdiction to grant the relief sought, then the action, or a divisible part thereof, may be certified to some other court which has jurisdiction. Its application is illustrated in such cases as *Cronin v. Janesville T. Co.* 163 Wis. 436, 158 N. W. 254; *Komorowski v. Jackowski,* 164 Wis. 254, 159 N. W. 912, or of *Dring v. Mainwaring,* 168 Wis. 139, 169 N. W. 301, where proceedings in one court were permitted to be changed in form and substance or certified to another court which may more properly assume jurisdiction; but it cannot avail the plaintiff here.

By parity of reasoning neither can the dismissal of the proceedings before the industrial commission in March, 1917, be considered in substance or effect as analogous to such a nonsuit in a court of proper jurisdiction after which a second suit for the same cause of action may be instituted and the first cause be considered as a substantial compliance with the last sentence of sub. (5), sec. 4222, quoted above, as was held in the cases of *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809, or in *Wawrzyniakowski v. Hoffman & Billings M. Co.* 146 Wis. 153, 158, 131 N. W. 429.

Plaintiff having failed to comply with the provisions of sub. (5), sec. 4222, he lost the right of action asserted in this case, and the court below properly directed judgment for the defendant.

This disposition of the case renders it unnecessary to consider any other questions presented on this appeal.

By the Court.—Judgment affirmed.

BELL LUMBER COMPANY, Plaintiff, vs. NORTHERN NATIONAL BANK, Respondent: MAY and others (interpleaded defendants), Appellants.

April 6—May 4, 1920.

Appeal and error: Order bringing in new parties defendant: Special proceeding: Provisional remedy.

An order made under sec. 2610, Stats., granting the application of defendant to make third persons parties defendant, is not a special proceeding as defined in sec. 2594, nor an order granting, refusing, continuing, or modifying a provisional remedy within sub. (3), sec. 3069.

APPEAL from an order of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Dismissed.*

This action was brought by the plaintiff against the defendant the *Northern National Bank*. Plaintiff claims that the bank discounted and cashed ten time-checks drawn on the defendant of the total amount of $370.14, which time-checks were forgeries. The complaint charges negligence by the bank in cashing these time-checks. The answer of the defendant bank denies negligence and alleges that the time-checks set out in the complaint were indorsed by the holders thereof when they were presented and cashed at the bank. The affidavit of the cashier of the defendant bank alleges that the indorsers discounted these time-checks with this defendant and were given credit for them. The bank served notice upon the parties who had the time-checks cashed at the bank and demanded that they be made parties to enable the bank to litigate its claim against them arising out of its liability to plaintiff, if any, and its remedy against them as alleged owners of the time-checks who received payment from the bank. The affidavits also set out that the claim was made against them without collusion of this defendant, and that the rights of the several parties connected with the cashing of these time-checks cannot be disposed of unless they be made defendants in the action.

The court made an order making them parties defendant, from which order they appeal.

For the plaintiff the cause was submitted on the brief of *Lamoreux & Cate* of Ashland.

For the appellants there were briefs by *Sanborn, Lamoreux & Pray* of Ashland, and oral argument by *Horace B. Walmsley* of Milwaukee.

For the respondent the cause was submitted on the brief of *Geo. F. Merrill* of Ashland.

On the question of the appealability of the order there was a brief for the appellants by *Sanborn, Lamoreux & Pray,* attorneys, and a separate brief by *Mr. Horace B. Walmsley,* of counsel.

SIEBECKER, J. Briefs have been prepared by counsel upon the question of the appealability of the order, as directed by the court. It is contended by appellants that the order is appealable under the following provision of sub. (3), sec. 3069, Stats.: "When an order grants, refuses, continues or modifies a provisional remedy." It is claimed by appellants that the order appealed from is in its character a provisional remedy within the contemplation of this provision in sec. 3069. It is also suggested that if this order is not a provisional remedy it may be classed as a special proceeding within sec. 2594, Stats. As stated in *Milwaukee C. Co. v. Flagge,* 170 Wis. 492, 175 N. W. 777: "The Code (sec. 2594, Stats.) divides all remedies into (1) actions and (2) special proceedings. . . . The term 'special proceedings' includes only remedies not furnished by actions." This order is one made in an action and hence cannot be a special proceeding within this provision of the Code. The statute under which this order is made, sec. 2610, declares:

"A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the

recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, and the court may in its discretion, make such order."

This procedure has for its object to litigate in one action contentions between persons related to the same general subject and to protect the parties thereto against hardship and to expedite the settlement of such contentions in one action. The primary rights of the parties to the action and those so brought in as parties by such an order are in no way determined by this order. It does no more than make them parties to an action for the purpose of enforcing the rights of the parties related to the subject in controversy. The procedure is a creation of the Code. Bringing the appellants into court in this action by an order in no sense creates, modifies, continues, or refuses any rights or remedies of the parties to the action; it is a procedure under the statute enabling the parties to enforce their rights in one action, which at the common law were enforced in separate actions. In its character this procedure is not of the nature of those which have been commonly characterized as provisional remedies, such as proceedings for injunctions, attachment, appointment of receivers, or an order for inspection and making copies of books, as declared in *Noonan v. Orton,* 28 Wis. 386. This procedure to make appellants defendants in this action pursuant to sec. 2610 is in substance an ordinary proceeding in an action to enable litigants to litigate their controversies, and does not affect their rights and remedies, it merely prescribing this practice for their enforcement. It is considered that the order appealed from is not a special proceeding and that it is not an order granting, refusing, continuing, or modifying a provisional remedy, and hence is not an appealable order within the provisions of sec. 3069.

By the Court.—The appeal is dismissed.

FELDMEIER, Appellant, vs. SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, Respondent.

April 6—May 4, 1920.

Insurance: Notice of rejection of application: Pleading: Verification of answer: Motion to strike out: Judgment: Opening default: Discretion of court: Waiver of right to appeal.

1. Where plaintiff, without objection, retained defendant's answer to the complaint for nearly a year, it cannot, on the eve of trial, raise the question of the sufficiency of the verification by a motion to strike out the answer.
2. It was not an abuse of discretion by the court to set aside a judgment entered upon default where the default was adequately explained and defendant was entitled to a new trial; and the plaintiff, by accepting and retaining, without objection, the costs imposed by the order opening the case, waived his right of appeal.
3. In an action to recover on an alleged contract of insurance for loss sustained by a fire, where it appeared that plaintiff's son had previously acted in the matter of obtaining insurance by carrying a message to plaintiff that the policy was about to expire, it is *held* that the local agent of the insurance company was justified in mailing to the son notice that the application in its present form would be rejected; and where the son failed to open the letter and the property was burned before the application was corrected, there can be no recovery.

APPEAL from an order and a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action to recover on an alleged contract for insurance for loss sustained by a fire. In May, 1918, a default judgment was entered against defendant for $1,239.40. In July of the same year, upon defendant's application, the court entered an order vacating the judgment upon terms which were paid by defendant to plaintiff.

Upon the application for opening up the judgment defendant served a proposed answer verified as follows:

"A. F. Dean, being first duly sworn, on oath says that he is an officer of the defendant, to wit, its manager; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge; that the reason

why this verification is not made by the defendant is that the defendant is a corporation, and deponent such officer and acquainted with the facts."

The court upon setting aside the judgment ordered the proposed answer to stand as the answer in the case and it was retained by the plaintiff without objection. In May, 1919, the case was tried upon the merits and the court found as facts:

"(1) That the plaintiff's farm dwelling and other property had been insured by the defendant under a farm policy for a three-year term expiring January 15, 1918.

"(2) That on the said 15th day of January, 1918, plaintiff made an application in writing to the defendant, through its local agent at Bayfield, for insurance on said dwelling and certain other buildings, and grain and horses and cattle; for the sum of $1,200 upon the dwelling house, $1,500 upon the barn and sheds, $200 on grain and seeds, $300 on horses and $400 on cattle, 'for the term of three years from the day of approval by the manager.'

"(3) That the local agent forwarded this application to the home office at Chicago, Illinois, and on January 17, 1918, the defendant company, by its manager, returned the application to its agent at Bayfield with the following communication:

"Chicago, Ill., January 17, 1918.

"The Inglis Insurance Agency, Bayfield, Wisconsin:

"Gentlemen: We are compelled to return herewith the application of *Adelia Feldmeier* as same is not taken in accordance with our requirements. We cannot insure a limit of $150 on eight horses with only $300 insurance; neither can we grant a limit of $75 on twenty head of cattle where the insurance is only $400. We trust you can induce the owner to take out at least $600 insurance on horses and $1,125 on cattle, otherwise limits must be reduced.

"We require three-fourths insurance to value on live stock, based on the number of animals and limits asked for.

"Awaiting an early return of corrected application, I remain, Yours very truly, A. F. DEAN, Mgr.

"(4) That on January 20, 1918, defendant's agent at Bayfield wrote and mailed on either that day or the next day

the following letter and mailed it to Sebastian Feldmeier, Sunny Side, Bayfield county, R. F. D.:

"Bayfield, Wis., Jan. 20, 1918.

"S. Feldmeier: I inclose a letter from the insurance company which explains itself to understand the matter they either want the risk on each animal reduced or the amount increased as per their letter. I think that better increase the amount as the letter suggests. Be sure and return this letter to me telling what you wish done.

"Yours, ROBERT INGLIS.

"That S. Feldmeier is a son of plaintiff and lived with her upon her farm, the premises on which this insurance was intended to be placed. That the reason the defendant's agent mailed it to the son of the plaintiff was that he understood plaintiff was away from home more or less at the time and that she was most apt to receive it by mailing it to her son. Plaintiff's address, as placed upon the application, was Bayfield, Bayfield county, Wisconsin.

"(5) That S. Feldmeier received the communication in due course of mail, in a day or two after it was mailed at Bayfield, but that it was overlooked by him and not opened until after the 25th of January, 1918. That the fact that the defendant company had returned the application was not communicated until after the 25th of January, and she made no inquiry of it.

"(6) That on January 25, 1918, plaintiff's said dwelling house was destroyed by fire without fault on plaintiff's part. That said property was owned by plaintiff, and was of the value of $2,000 or more.

"(7) That on the 26th day of January, 1918, defendant's said agent at Bayfield, Wisconsin, denied all liability for said loss, and on March 30, 1918, defendant's state agent of Wisconsin, E. G. Frazier, wrote to plaintiff's attorney denying all liability of the defendant for the loss on the ground that defendant had rejected the application for insurance."

And as conclusions of law:

"(1) That there was no contract for insurance between the parties at the time of the fire, for all of the property or the dwelling alone.

"(2) That defendant is not estopped from claiming non-acceptance of the application by reason of delay in communicating to plaintiff the rejection of the application as made."

From the order granting a new trial and the judgment dismissing the action upon the merits the plaintiff appealed.

John J. Fisher of Bayfield, for the appellant.

A. W. MacLeod of Washburn, for the respondent.

VINJE, J. At the commencement of the trial the plaintiff moved to strike out the answer on the ground that it was not properly verified, because sworn to by an agent of the corporation and his grounds of knowledge were not set forth. The verification purports to be by an officer of the corporation and seems sufficient. But, without deciding the question of its sufficiency, it is plain the court properly denied the motion because plaintiff had retained the answer nearly a year without objection. If he thought the verification was defective he should have seasonably returned it for that reason. Not having done so, he could not be heard to raise the question of the sufficiency of the verification on the eve of trial. *Paine v. Smith,* 32 Wis. 335.

It is urged the court erred in setting aside the judgment and granting a new trial. There are two answers to this claim: first, there was no abuse of discretion in opening up the default because it was adequately explained and defendant was entitled to a new trial; and second, the plaintiff, by accepting the costs imposed by the order and retaining them without objection, waived any right of appeal therefrom. *Smith v. Coleman,* 77 Wis. 343, 46 N. W. 664; *Price v. Grzyll,* 133 Wis. 623 (114 N. W. 100) and cases cited on page 627.

From the facts found by the court, which are not challenged, it is plain that no contract of insurance was made. The application was refused and seasonably returned to the agent at Bayfield. He sent it to plaintiff's son, who lived

with his mother. He did this under information to the effect that plaintiff, the mother, was temporarily away from the farm. The son had previously acted in the matter of trying to effect this insurance by carrying the message to her that the policy was about to expire. Under the circumstances the agent was justified in mailing the letter of refusal to the son. Had he opened it when it was received there would have been time to effect new insurance. But he testified that the letter remained unopened in his house for several days and until after the fire. Defendant used due diligence in communicating its disapproval of the application to plaintiff and hence no liability attaches to it for the fire loss.

By the Court.—Order and judgment affirmed.

LYANNES, by guardian *ad litem,* Respondent, vs. LYANNES, Appellant.

April 7—May 4, 1920.

Marriage: Action for annulment: Jurisdiction of court: Presumption of validity of marriage: Marriage license law: Eugenic law: Extraterritorial effect: Fraud in inducing marriage: Misrepresentations as to age: Evasion of state law: Consummation of marriage: Marriage of residents of Wisconsin in other states.

1. Under secs. 2351 *et seq.,* Stats. 1919, an action for the annulment of a marriage, jurisdiction of which is by sec. 2348 given the circuit court, is the proper remedy for setting aside either a void or a voidable marriage.
2. Jurisdiction and power to annul a marriage, like that to divorce the parties, is exclusively of statutory creation, and cannot be extended under the general equitable powers of the court.
3. The presumption in favor of the validity of a marriage overrides the presumption of evidence that the laws of a sister state are the same as those of the forum, and in the absence of any allegation in the complaint to the contrary it will be deemed, on the consideration of a demurrer, that the parties to the marriage were not disabled or prohibited from marrying at the place where the ceremony was performed.

4. Neither the marriage license law (secs. 2339*n*—1 to 2339*n*—27, Stats.) applicable to marriages solemnized in Wisconsin, nor sec. 2339*m*, providing for an ante-nuptial physical examination of those who are applicants for a license to marry within the state, has extraterritorial effect.
5. Neither representation by the man that he is two years older than he is in fact, nor inducing a marriage in evasion of the state law, in another state, nor both, is or are of such substantial nature as to warrant annulment of the marriage for fraud.
6. An allegation of the complaint that plaintiff left defendant on the day after their marriage "and has never since cohabited with him," in effect admits cohabitation prior to leaving and constitutes a consummation of the marriage within sub. (4), sec. 2351.
7. Sec. 2330*m*, Stats., so far as it relates to marriage in another state of residents of this state, renders null and void such marriage only where the parties are disabled or prohibited, under the laws of this state, from marrying under any circumstances; that is, such a marriage as is prohibited by sec. 2330.

APPEAL from an order of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed.*

The trial court overruled the defendant's general demurrer which alleged that plaintiff's complaint failed to state a cause of action. The complaint alleged substantially as follows:

The due appointment of a guardian *ad litem* for plaintiff.

That at Bessemer, Michigan, on June 14, 1919, there was a form of marriage between the parties, both at that time being, intending to continue to be, and since are residents of the state of Wisconsin.

That defendant falsely represented to plaintiff that he was at that time twenty-one years of age, but that the marriage was legal in Michigan without complying with the laws of Wisconsin.

That in applying for a license in Michigan for such marriage he falsely stated that both of the parties were over twenty-one.

That in fact the defendant's real age was eighteen and

the plaintiff's twenty, and that the parents of neither gave their consent to a marriage.

That defendant failed to submit to a physical examination for the purpose of determining whether or not he was afflicted with a venereal disease, pursuant to sec. 2339*m*, Stats.

That defendant failed to secure the consent of his parents to such marriage under sec. 2339*n*—5, Stats.

That defendant, while prohibited in the state of Wisconsin from entering into such marriage, went to Michigan and there contracted a marriage prohibited in this state.

That plaintiff was induced to consent to such form of marriage because of her belief in the representations of defendant above stated, by her ignorance of his misstatements in his application for a license, and by her ignorance of the requirements for a legal marriage under the laws of the state of Wisconsin, and that otherwise she never would have consented to the said marriage.

That defendant fraudulently contracted said marriage in Michigan for the purpose of evading the laws of Wisconsin.

That immediately upon her discovery of the falsity of the representations aforesaid and the evasion of the Wisconsin law and on June 15, 1919 (being the day subsequent to said marriage), she left defendant and has never since cohabited with him.

Plaintiff prays that the marriage be annulled and declared void as provided by statute. From the order overruling the demurrer defendant appeals.

The material parts of several of the statutes considered on this appeal other than those set out at length in the opinion are here inserted:

MARRIAGE.

Chapter 107, Stats. 1919.

"*Who shall not marry; divorced persons.* Section 2330. 1. No marriage shall be contracted while either of the

parties has a husband or wife living, nor between persons who are nearer of kin than second cousins, excepting that marriage may be contracted between first cousins where the female has attained the age of fifty years. Relationship under this section shall be computed by the rule of the civil law, whether the parties to the marriage are of the half or of the whole blood. No insane person, epileptic or idiot shall be capable of contracting marriage.

"2. It shall not be lawful for any person, who is a party to an action for divorce from the bonds of matrimony, in any court in this state, to marry again until one year after judgment of divorce is entered, and the marriage of any such person solemnized before the expiration of one year from the date of the entry of judgment of divorce shall be null and void."

MARRIAGE EVASION LAW.

"*Marriage abroad to circumvent the laws.* Section 2330*m*. 1. (Set out in full in decision.)

EUGENIC MARRIAGE LAW.

"*Ante-nuptial physical examination.* Section 2339*m*. 1. All male persons making application for license to marry shall at any time within fifteen days prior to such application, be examined as to the existence or nonexistence in such person of any venereal disease, and it shall be unlawful for the county clerk of any county to issue a license to marry to any person who fails to present and file with such county clerk a certificate setting forth that such person is free from venereal diseases so nearly as can be determined by a thorough examination and by the application of the recognized clinical and laboratory tests of scientific search, when in the discretion of the examining physician such clinical and laboratory tests are necessary."

(Then follow provisions for microscopical examination and the Wasserman test.)

"Such certificate shall be made by a physician, licensed to practice in this state or in the state in which such male person resides, shall be filed with the application for license to marry" (and then follows form of certificate).

"2. Such examiners shall be physicians duly licensed to practice in this state, or in the state in which such male person resides."

(Then follows provision for the fee and for the examination by county or asylum physician if applicant be indigent.)

"3. Any county clerk who shall unlawfully issue a license to marry to any person who fails to present and file the certificate provided by subsection 1 of this section, or any party or parties having knowledge of any matter relating or pertaining to the examination of any applicant for license to marry, who shall disclose the same, or any portion thereof, except as may be required by law, shall upon proof thereof be punished by a fine of not more than one hundred dollars or by imprisonment not more than six months.

"4. Any physician who shall knowingly and wilfully make any false statement in the certificate provided for in subsection 1 of this section shall be punished by a fine of not more than one hundred dollars or by imprisonment not more than six months."

"*Marriage of person having had venereal disease.* Section 2339*n*. 1. No person who has ever been afflicted with gonorrhea or syphillis shall be granted a marriage license in this state until such person shall furnish to the county clerk issuing the license a certificate . . ."

(Then follow provisions as to the persons who shall issue and the manner and form of such certificate.)

"4. Any person who shall obtain any such license contrary to the provisions of this section shall, upon conviction thereof, be punished by a fine of not less than one hundred dollars or by imprisonment in the county jail for not less than three months, or by both such fine and imprisonment."

MARRIAGE LICENSES.

"*Marriage contract; how made.* Section 2339*n*—1. Marriage may be validly contracted in this state only after a license has been issued therefor, in the manner following: . . ."

"*Consent of parent or guardian.* Section 2339*n*—5. No license shall be issued if either of the contracting parties be under the marriageable age of consent as established by law. If either of the contracting parties be between the age of eighteen years and twenty-one years if a male, and between the age of fifteen years and eighteen years if a female, no license shall be issued without the consent of his or her parents or guardian, or of the parent having the actual care,

custody and control of said party or parties, given before the county clerk under oath, or certified under the hand of such parents or guardian as aforesaid, and properly verified by affidavit before a notary public or other official authorized by law to take affidavits, which certificate shall be filed of record in the office of said county clerk and entered by him on the marriage license docket before issuing said license; provided, that if there be no guardian or parent having the actual care, custody and control of said party or parties, then the judge of the court having probate jurisdiction in the county where the application is pending may, after hearing, upon proper cause shown, make an order allowing the marriage of said party or parties."

DIVORCE.

Chapter 109, Stats. 1919.

"*Jurisdiction.* Section 2348. The circuit court has jurisdiction of all actions to affirm or to annul a marriage, or for a divorce from the bond of matrimony, or from bed and board, and authority to do all acts and things necessary and proper in such actions and to carry its orders and judgments into execution as hereinafter prescribed. All such actions shall be commenced and conducted and the orders and judgments therein enforced according to the provisions of these statutes in respect to actions in courts of record, as far as applicable, except as provided in this chapter."

"*Marriages; annulment; causes for.* Section 2351. A marriage may be annulled for any of the following causes existing at the time of marriage:

"*Impotency, etc.* (1) Incurable physical impotency or incapacity of copulation, at the suit of either party, provided that the party making the application was ignorant of such impotency or incapacity at the time of marriage.

"*Consanguinity, etc.* (2) Consanguinity or affinity where the parties are nearer of kin than the second cousins, computing by the rule of civil law, whether of the half or of the whole blood, at the suit of either party; but when any such marriage shall not have been annulled during the lifetime of the parties, the validity thereof shall not be inquired into after the death of either party.

"*Former marriage.* (3) When such marriage was con-

tracted while either of the parties thereto had a husband or wife living, at the suit of either party.

"*Fraud, etc.* (4) Fraud, force, or coercion, at the suit of the innocent and injured party, unless the marriage has been confirmed by the acts of the injured party.

"*Insanity.* (5) Insanity, idiocy, or such want of understanding as renders either party incapable of assenting to marriage, at the suit of the other, or at the suit of a guardian of the lunatic or incompetent, or of the lunatic or incompetent on regaining reason, unless such lunatic or incompetent, after regaining reason, has confirmed the marriage; provided that where the party *compos mentis* is the applicant, such party shall have been ignorant of the other's insanity or mental incompetency at the time of the marriage, and shall not have confirmed it subsequent to such person's regaining reason.

"*Nonage of wife.* (6) At the suit of the wife when she was under the age of fifteen years at the time of the marriage, unless such marriage be confirmed by her after arriving at such age.

"*Nonage of husband.* (7) At the suit of the husband when he was under the age of eighteen at the time of the marriage, unless such marriage be confirmed by him after arriving at such age."

For the appellant the cause was submitted on a brief signed by *A. J. O'Melia* of Rhinelander.

Charles F. Smith of Rhinelander, for the respondent.

On behalf of the State there was a brief by the *Attorney General* and *M. B. Olbrich,* deputy attorney general, as *amici curiæ,* and oral argument by *Mr. Olbrich.*

A brief was also filed as *amici curiæ* by *Eugene A. Gilmore, John B. Sanborn,* and *Julius E. Roehr,* Wisconsin commissioners on uniform state laws, and oral argument by *Mr. Sanborn.*

ESCHWEILER, J. Sec. 2330*m,* Stats., reads as follows:

"*Marriage abroad to circumvent the laws.* Section 2330*m.* 1. If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting

marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.

"2. No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void."

The effect to be given to sub. 1 of that statute will determine two important questions presented on this appeal as to whether it is within the jurisdiction of and a proper exercise of the power of a circuit court of this state to annul and declare as void *ab initio* a marriage by residents of this state who intend to continue to be such residents, when solemnized without this state under the following situations:

First. Where there was a failure to observe the provisions of the marriage license law of this state embodied in sec. 2339*n*—1 to sec. 2339*n*—27, Stats., inclusive, and that because

(a) No license, prior to the ceremony, was obtained under sec. 2339*n*—1, *supra;* or because

(b) The consent of parent or guardian, required for a license here, was not first obtained under sec. 2339*n*—5. *supra.*

Second. Where the male failed to have the ante-nuptial physical examination for the determining of the existence or nonexistence of venereal disease as provided in the so-called eugenic marriage law, sec. 2339*m, supra.*

These two questions may be stated in another form as requiring us to determine whether either or both the eugenic marriage law, sec. 2339*m, supra,* and the marriage license law, sec. 2339*n*—1 to sec. 2339*n*—27, inclusive, is or are extraterritorial in effect.

Any attempted solution of these questions necessarily involves a consideration of the public policy of this state as declared by statute and judicial decisions.

The proper mating of the male and female of the human race as the foundation of the family, and thereby of the general well-being of the community at large, has been deemed of such paramount importance that the state has constantly assumed a wide control over the relationship of husband and wife of those residing within its borders.

From the beginning of our state government it has been declared as part of its public policy that marriage, so far as its validity in law is concerned, is a civil contract to which the consent of parties capable in law of contracting is essential. Sec. 2328. The age at which the male and female respectively must arrive before they were considered at common law to be of sufficient capacity to enter into such a contract was fourteen and twelve years respectively, but that has been, during the entire history of this state, raised to the years of eighteen and fifteen respectively. Sec. 2329; *Eliot v. Eliot,* 77 Wis. 634, 640, 46 N. W. 806.

The same public policy has consistently and continuously recognized substantially three different classes as to those who claim to have, or of whom it is claimed they have, entered into the relationship of husband and wife:

First. Those who, competent to so contract, have complied with the statutory requirements and thereby made a valid marriage.

Second. Those who, by reason of some positive inhibition of the law, are absolutely disabled and prohibited from sustaining to each other the lawful relationship of husband and wife and whose attempt so to sustain to each other such legal relationship is denominated, from want perhaps of a more logical description, a void marriage.

Third. Parties to a marriage denominated voidable, which, although improper, illegal, or irregular in its inception, may by the removal of the impediments then existing

or by subsequent cohabitation or recognition of the relationship become valid.

In the void marriage the relationship of the parties, so far as its being legal is concerned, is an absolute nullity from its very beginning and cannot be ratified. It may be questioned at any time during the life of both, and, with some statutory exceptions (*vide* sub. (2), sec. 2351, Stats.), after the death of either or both, and generally whether the question arises directly or collaterally. As between the two individuals concerned no rights spring therefrom, and, generally speaking, except as modified by positive legislation, it needs no adjudication by a court that it is void. That such is the law of this state has been repeatedly held. *Williams v. Williams,* 63 Wis. 58, 68, 23 N. W. 110; *St. Sure v. Lindsfelt,* 82 Wis. 346, 352, 52 N. W. 308; *Zahorka v. Geith,* 129 Wis. 498, 505, 109 N. W. 552; *Lanham v. Lanham,* 136 Wis. 360, 368, 117 N. W. 787.

It is so regarded elsewhere. 18 Ruling Case Law, 440; Bishop, Mar., Div. & Sep. p. 107, § 258; Schouler, Dom. Rel. p. 25, § 14; Stewart, Mar. & Div. § 50; Nelson, Div. & Sep. p. 533, § 568; L. R. A. 1916C, note p. 691; *Wiley v. Wiley* (Ind.) 123 N. E. 252, and cases cited.

The void marriage, strictly speaking, is one where the relationship between the parties is necessarily incestuous, as between parent and child and brother and sister, and invariably, where monogamy is the law of the land, when either has a spouse living from whom he or she is not then legally divorced. The latter class includes those as between whom a judgment of divorce has already been entered, but by the public policy of the jurisdiction in which the divorce is granted are prohibited from another marriage within a statutory period after such judgment, and as to whom, in effect, the matrimonial knot is not yet completely severed by the sword of divorce. This covers the situation of those in this state under sub. 1, sec. 2374, Stats., and has been so construed by this court. *Lanham v. Lanham,* 136 Wis. 360,

368, 117 N. W. 787; *Armstrong v. Industrial Comm.* 161 Wis. 530, 154 N. W. 844; *Hall v. Industrial Comm.* 165 Wis. 364, 368, 162 N. W. 312.

As to parties to a void marriage, the question of compliance or noncompliance with any statutory provisions such as for ante-nuptial physical examination or the prerequisite of marriage license, are entirely irrelevant. As to them, the obtaining of a marriage license, the consent of their parents if they be minors, or subsequent cohabitation as though lawfully married, are all of no avail and neither help nor change their situation in that regard.

The voidable marriage, on the other hand, may subsequently ripen into an absolute marriage, and is considered valid and subsisting until annulled by judgment of a court of competent jurisdiction. *Eliot v. Eliot,* 77 Wis. 634, 641, 46 N. W. 806; *State v. Cone,* 86 Wis. 498, 57 N. W. 50; *Kitzman v. Werner,* 167 Wis. 308, 314, 166 N. W. 789; *Estate of Jansa,* 169 Wis. 220, 171 N. W. 947; *State v. Yoder,* 113 Minn. 503, 103 N. W. 10, L. R. A. 1916C, 686, and note at p. 691; *Behsman v. Behsman* (Minn.) 174 N. W. 611.

Between the absolutely void marriages and the voidable marriages, the distinction is often shadowy and the line hard to place. Both forms are intermingled in the provisions of sec. 2330, *supra,* providing who shall not marry. Also in the provisions of sec. 2351, *supra,* which gives the causes for which marriages may be annulled. *Becker v. Becker,* 153 Wis. 226, 228, 140 N. W. 1082.

Prior to ch. 323, Laws 1909, which repealed certain statutes between secs. 2349 to 2360 inclusive as then found, and which chapter enacted and amended certain sections which are now found in ch. 109 on the subject of divorce, certain of such void marriages, namely, those on account of consanguinity between the parties, or on account of either of them having a former husband or wife then living, were by the then sec. 2349 (as found in the revision of

1898) declared to be absolutely void without any judgment of divorce or other legal proceeding, although by then existing sec. 2351 an annulment action might nevertheless be maintained. Since such ch. 323, Laws 1909, however, and by the law as it now stands in sec. 2351 *et seq.*, the action for annulment is the proper remedy to set aside both the void and the voidable marriage. The jurisdiction, and therefore the power, to so decree annulment of both such is conferred on the circuit court by sec. 2348, *supra.*

Although the question perhaps is not squarely presented on this appeal, yet as it is inferentially at least before us in determining the extent of the power and jurisdiction of the circuit court to grant relief to plaintiff in any phase of the situation that may be disclosed by the complaint, we deem it proper to say that we can see no valid reason for holding otherwise than that the jurisdiction and power to annul is exactly the same as to divorce and that both are exclusively of statutory creation and neither rest upon nor can be extended by resort to the general equitable powers inherent in the circuit court as a court of equity.

It has been so held as to divorce. *Barker v. Dayton,* 28 Wis. 367, 379, and in the recent case of *Towns v. Towns, ante,* p. 32, 176 N. W. 216, and the long line of intermediate cases.

The ruling now made is but a recognition of evident legislative intent from the statutory grouping of the two subjects of divorce and annulment.

It is so held elsewhere (*Walter v. Walter,* 217 N. Y. 439, 111 N. E. 108), although there are authorities to the contrary, such as *Christlieb v. Christlieb* (Ind.) 125 N. E. 486; *Wimbrough v. Wimbrough,* 125 Md. 619, 94 Atl. 168; *Davis v. Davis* (N. J.) 106 Atl. 644; *Wiley v. Wiley* (Ind.) 123 N. E. 252; *Bolmer v. Edsall* (N. J.) 106 Atl. 646; *Hunt v. Hunt,* 23 Okla. 490, 100 Pac. 541, 22 L. R. A. N. S. 1202; 26 Cyc. 908; 9 Ruling Case Law, 267.

In determining the question whether the circuit court has

statutory power to annul this particular marriage solemnized in Michigan, we are bound to assume, in the absence of any allegations to the contrary, that it was not void there and that the parties were not disabled or prohibited from marrying in that state. *Lanctot v. State,* 98 Wis. 136, 138, 73 N. W. 575; *Bolmer v. Edsall* (N. J.) 106 Atl. 646, 652; *Schaffer v. Richardson,* 125 Md. 88, 93 Atl. 391, L. R. A. 1915E, 186 and note; 26 Cyc. 877. The presumption in favor of the validity of such a contract should override the presumptions of evidence in ordinary contract cases that the laws of a sister state, the pleadings being silent, are the same as those of the forum. And moreover, the latter rule does not apply as to laws containing penal provisions, as some at least of those here involved do. *Hull v. Augustine,* 23 Wis. 383; *St. Sure v. Lindsfelt,* 82 Wis. 346, 351, 52 N. W. 308; *Schoenberg v. Adler,* 105 Wis. 645, 81 N. W. 1055.

It appears from the complaint that defendant failed to do that which, under the marriage license law of this state, sec. 2339*n*—1 to sec. 2339*n*—27, Stats., he would be required to before solemnizing his marriage in this state, viz. (1) the procuring of a license pursuant to sec. 2339*n*—1, which says: "Marriage may be validly contracted in this state only after a license has been issued therefor;" . . . (2) there was of course no five days' interval between an application for such license and the issuing thereof (sec. 2339*n*—3); (3) he did not obtain the consent of his parents, he being between the age of eighteen and twenty-one years (sec. 2339*n*—5); (4) he obtained no certificate as to an ante-nuptial physical examination (sec. 2339*m*). (But this question is discussed later.)

It is argued in substance that, failing the foregoing, his marriage could not be valid, and not being valid it must necessarily be invalid, and that particularly by reason of the language of sec. 2339*n*—21, as follows:

"All marriages hereafter contracted in violation of any

of the requirements of section 2339*n*—1 shall be null and void (except as provided in sections 2339*n*—22 and 2339*n*—23); provided, that the parties to any such void marriage may, at any time, validate such marriage by complying with the requirements of sections 2339*n*—1 to 2339*n*—27, inclusive."

That the Michigan ceremony as though likewise performed here was necessarily "null and void," and therefore he was thereby "disabled or prohibited" from making a legal marriage here or elsewhere. That he was therefore squarely within the terms and the letter of the marriage evasion law (sec. 2330*m*), quoted at the beginning of this opinion.

The language of many of these provisions, and particularly the first appearing in the marriage license law as sec. 2339*n*—1, expressly refers to a marriage which may be validly contracted *"in this state."*

Violations of the terms and conditions of many of these marriage license laws subject the parties thereto to penalties or forfeitures; particularly secs. 2339*n*—1, 2339*n*—8, 2339*n*—15, 2339*n*—16, 2339*n*—17, 2339*n*—18, 2339*n*—19, Stats. Such fines or forfeitures, by sec. 2339*n*—20, are recoverable in an action of debt and therefore presumably are under the provisions of ch. 142 (secs. 3294 to 3313, inclusive), and in which the state becomes an interested party. Manifestly the state could not create or even acquire an interest of such nature as is involved in the right to recover fines or forfeitures for a transaction without its boundaries.

Further, under this very sec. 2339*n*—21, *supra,* and just above quoted, though declaring that marriages in violation of the provisions of the law shall be "null and void," yet nevertheless it also provides that such "null and void" marriage may be subsequently validated by a subsequent compliance with the very statutes thus violated.

By secs. 2339*n*—22 and 2339*n*—23, *supra,* it is declared that good-faith marriages shall not be void in the event of

there existing certain irregularities declared immaterial, some of which appear quite substantial; as, for instance, a want of authority or jurisdiction in the person officiating, the issuing of a license without the consent of the parents or by a county clerk not having jurisdiction to issue the same, or in the form of the application for the license itself, or other grounds in those sections set forth.

It further appears that these particular provisions were enacted as the result of a report to the legislature by the commissioners on uniform state laws heretofore appointed under secs. 13.31 and 13.32, Stats. Their duties were to act in conventions with like commissioners of other states for the purpose of advising and recommending to the legislature measures tending to secure uniform legislation in the different states. Sec. 2339*n*—26 declares that the general purpose of this marriage license law is to make uniform the laws of those states which enact them, and it should therefore be construed as being in harmony and uniformity with similar provisions in other states which have or hereafter shall adopt the same. The substance of such recommended marriage license law appears to have been adopted by the following states besides our own, viz.: Vermont in 1912, Massachusetts in 1913, and Illinois in 1915.

We therefore hold that this marriage license law as contained in secs. 2339*n*—1 to 2339*n*—27 cannot be considered as having any extraterritorial effect and therefore as not affecting the marriage here before us or as bringing it within the purview of sec. 2330*m*, *supra*.

The question of the construction that should be given to this marriage license law, and particularly as to sec. 2339*n*—21, *supra*, in case of a violation of the provisions of such license law by parties to a marriage celebrated or consummated within this state, is not before us and we express no opinion thereon.

In disposing of the question still remaining, as to whether or not the failure by defendant to comply with the eugenic

marriage law (sec. 2339*m*, *supra*), considered either in connection with the marriage evasion law (sec. 2330*m*) or as an independent proposition, we fully appreciate the force and weight that should be given to the reasoning of the trial court and the argument here submitted that such default is sufficient ground for the courts of this state to annul a marriage solemnized in Michigan. We appreciate also the possible far-reaching effect of a decision either way on such an important question.

The requirement of such ante-nuptial physical examination of applicants for license for marriage ceremonies to be solemnized in this state is declared to be within the proper field of legislative action, and the evident purposes of the act fully discussed, in the case of *Peterson v. Widule,* 157 Wis. 641, 147 N. W. 966. The question of its constitutionality, so far at least as it affects marriage ceremonies within this state, is there settled and is now at rest.

As originally enacted by ch. 738, Laws 1913, it contained provisions subjecting a county clerk unlawfully issuing a license without such certificate to imprisonment from one to five years, and a physician wilfully making false statements therein subject to conviction for perjury and the revocation of his license.

By ch. 525, Laws 1915, evidently recognizing the suggestion made by this court in the *Peterson v. Widule Case, supra,* in that regard, these penalties were reduced to a fine of not more than $100 or not more than six months' imprisonment for such violation by the county clerk and physician respectively.

Sub. 5, sec. 1, ch. 738, Laws 1913, provided for the punishment by imprisonment not more than one year of any person a resident of this state who, intending to evade the provisions of the act in question, should go into another state and have a marriage there solemnized and fail within one year from such marriage, on returning to this state, to file with the county clerk of the county in which he shall then

be a resident a similar certificate. By ch. 525, Laws 1915, such sub. 5 was repealed, and the penalty clause therein provided does not subsequently appear in our law.

At the same session of the legislature, ch. 270, Laws 1915 (sec. 2330*m*, Stats.), was enacted, and which has been cited at the head of this opinion.

It is urged that the omission of the penal provision found in said sub. 5, sec. 1, and then the re-enactment, by said sec. 2330*m*, of what it was urged was the main purpose of ch. 738, Laws 1913, indicates a legislative intent to make a marriage solemnized without such prerequisite ante-nuptial physical examination a prohibited one, rather than one which subjects the participant to punishment only, and a male party to a marriage without such prerequisite is therefore "disabled and prohibited" from entering into such ceremony, and under the other provisions of the law his marriage is necessarily null and void whether within or without the state.

We are however forced to the conclusion that the same line of reasoning that has led us to the determination above reached as to the marriage license law having no extraterritorial effect, applies equally to this eugenic marriage law's requirement of an ante-nuptial physical examination. We are not unmindful in reaching this conclusion of the fact that under the original act in 1913 and until amended by ch. 212, Laws 1917, such ante-nuptial physical examination was required to be by a physician of this state, and that by such amendment in 1917 provision was made for the issuing of such a certificate by a physician in the state in which the male person shall reside. We cannot regard such amendment, however, as doing more than to afford a nonresident male desiring a solemnization of his marriage within this state a more convenient method of complying with our law, rather than as indicating that the statute was intended to be of extraterritorial effect so far as affecting marriages by residents of this state without this state.

The requirement of the ante-nuptial physical examination under this law is made obligatory only upon him who is an applicant for a marriage license, and this must be construed to refer to the applicant for a marriage license within this state for a marriage ceremony to be solemnized here.

The eugenic marriage law, therefore, or sec. 2339*m*, Stats., and undoubtedly its companion statute, sec. 2339*n*, which provides for the obtaining by any male applicant for a license who had ever been afflicted with a venereal disease of a proper certificate as to a complete cure, does not make null or void the outside marriage and does not "disable or prohibit," within the meaning of the term as used in sec. 2330*m*, persons otherwise competent and capable of contracting a valid marriage who do so contract without the state.

The last point urged by plaintiff in support of her complaint, and sustained by the trial court, is on the ground that sufficient appears therefrom to show such a fraud as to make it ground for annulment of the marriage ceremony under the provisions of sub. (4), sec. 2351, *supra*. But two possible grounds can be found in the allegations of the complaint upon which such relief could be predicated: (1) that the plaintiff was deceived by the false representations of the defendant in that regard into taking unto herself a husband who was two years younger than he represented himself to be; and (2) that the inducing her to enter into a futile marriage ceremony in Michigan, an evasion of the Wisconsin law, was of such a humiliating nature as amounted to a fraud. The trial court in his opinion based his conclusion that the complaint was good on this branch of the case upon the second ground only.

In our judgment neither of these grounds or both is or are of such substance as to meet the requirements of the substantial nature of the fraud that must be shown as to this particular form of contract before it can be declared null and void.

A moment's consideration of the immense possibilities that would be open to those entrants into the matrimonial field, on subsequent disillusionment or disappointment to appeal to a court to annul the relationship on the ground that either had been deceived by the other as to the real number of years that such other had passed upon this earth, is more than sufficient to make us refrain from establishing such a precedent.

The very substantial nature of the alleged fraud, which it has been uniformly held must be shown before a marriage ceremony may be annulled for the fraud specified in sub. (4), sec. 2351, needs no extended discussion. Concealment by the female of prior unchastity is not. *Varney v. Varney,* 52 Wis. 120, 123, 8 N. W. 739; *Browning v. Browning,* 89 Kan. 98, 130 Pac. 852. Concealment of the fact of the existence of a venereal disease is such. *C—— v. C——,* 158 Wis. 301, 304, 148 N. W. 865. See, also, *Winner v. Winner,* decided herewith (*post,* p. 413, 177 N. W. 680). See, also, *Davis v. Davis* (N. J.) 106 Atl. 644; 26 Cyc. 905; 9 Ruling Case Law, 295.

There is a further reason why relief on the ground of fraud could not properly be granted the plaintiff in this case. Although the marriage took place on June 14th the further allegation is to the effect that she left her husband on the following day, June 15th, and "has never since cohabited with him." Although this is a negation of cohabitation after June 15th, it is nevertheless in effect an admission that there was cohabitation prior to her leaving the defendant, and therefore a consummation of the marriage within the provisions of said sub. (4), sec. 2351, and the well recognized authorities.

We summarize the results thus arrived at on the questions involved as follows:

(1) That actions for the annulment of an alleged marriage under sec. 2351, Stats., are of exclusive statutory jurisdiction.

(2) That the marriage license law (secs. 2339*n*—1 to 2339*n*—27, inclusive) is only applicable to marriages solemnized in the state of Wisconsin and has no extra-territorial effect.

(3) That sec. 2339*m*, providing for ante-nuptial physical examination, also has no extraterritorial effect and is applicable only to those who are applicants for a license to marry within the state of Wisconsin.

(4) That sec. 2330*m*, so far as it relates to marriages solemnized without the state of Wisconsin, renders null and void such pretended marriages only so far as the parties thereto are disabled or prohibited from entering into marriage under any circumstances under the laws of Wisconsin and to such form of marriages as can receive no validity by reason of the consent of parents if the parties are minors, the issuing of a license, or the ante-nuptial physical examination or other statutory requirements. In other words, that such section makes null and void in this state only such foreign marriages as are prohibited by sec. 2330.

(5) That sufficient grounds are not alleged to support an action for annulment on the ground of fraud.

It follows therefrom that the demurrer to the complaint should have been sustained.

By the Court.—The order overruling the demurrer to the complaint is reversed, and the cause remanded for further proceedings.

WILBUR and another, Appellants, vs. MEANS, Respondent.

April 7—May 4, 1920.

Sales: Waiver by seller of right to immediate payments: Duty to notify buyer that prompt settlement was required: Acceptance of partial payments on condition: Unreasonable delay of buyer: Evidence.

1. In an action by ice brokers for a breach by defendant of his contracts, assigned to them by the buyer, to sell and deliver ice, the evidence is *held* insufficient to support a finding that the defendant seller accepted a sight draft for $500 as the first payment on one of the contracts on condition that the plaintiff brokers should promptly pay the balance then due on the other, and that they did not promptly pay such balance.
2. Though an unreasonable time elapsed before the buyers of the ice made payment to the seller, a breach of the contracts was not the necessary or inevitable result, which, under sub. 2, sec. 1684*t*—45, Stats., depended on the terms of the contract and the circumstances of the case.
3. Where such buyers did not make prompt payment for each car of ice as received, they had a right to assume that similar dealings with reference to a completed contract would be satisfactory to the seller, who was under the duty to bring home to them the fact that he expected prompt payment for each car of ice shipped under the contract being then performed, if he intended to insist on such construction of the contract.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed.*

Defendant *Means* puts up and deals in ice at Rhinelander. Plaintiffs are brokers in ice doing business at Waukesha. April 2, 1919, *Means* entered into two contracts for the sale of ice with one P. J. Buckley, who thereafter assigned the same to plaintiffs. By one of these contract *Means* agreed to sell to Buckley or his assigns 1,000 tons of ice at $1.75 per ton f. o. b. Rhinelander. One hundred dollars was paid in cash, and Buckley further agreed to make satisfactory arrangements with *Means* for the further payments of said ice, railroad weights to govern. This was stack ice and was to be all shipped before May 15, 1919. By the

second contract *Means* agreed to sell Buckley or his assigns 1,000 tons of ice f. o. b. Rhinelander at $2.50 per ton for July and August delivery. A part payment of $500 was to be made on or before June 15, 1919, and at the time of making said payment further satisfactory arrangements were to be made for the payment of the balance upon the receipt by Buckley or his assigns of railroad weights. This ice was to be delivered from the icehouse of defendant, and will be referred to hereafter as the house-ice contract. Sometime in April, or at least early in the season, one car of stack ice was shipped and paid for. The balance of the stack ice was shipped on successive dates commencing June 2d and ending June 13th. No further payments were made on the stack ice, and the balance due defendant when delivery was completed was the sum of $249.48. On June 12th defendant wrote plaintiffs as follows:

"I have received several communications from you and will try to ans. at least some of them. You will find all of the bills with this including todays shipment you will see that bill on car 90454 NYC says no wght. I cannot tell how they let this get out without weighing. It was probably about 60,000 or 62,000. Perhaps the R. R. Co. weighed it somewhere *en route*. Now we shall load the last car of stack ice tomorrow but will continue to ld from house on house contract if you do not object I should rather load on Soo line than N W can you find it with Racine to take it over Soo Line after this week I have been having my troubles with that log track but that is done now. you can send me check the $500.00 on house contract. Let me know the condition of ice as to packing any complaint."

Defendant shipped a carload of house ice on each of the 16th, 17th, and 18th days of June. On the 18th day of June defendant wrote plaintiffs a letter in which he said:

"As I have not received your check for the $500 which was due on contract June 15, I cannot see my way clear to ship any more ice to your acct.

"I will send all bills of lading tomorrow and you can please forward check as soon as you can verify them. This is final."

On the 18th day of June *Wilbur* left Waukesha for Rhinelander, arriving there on the morning of the 19th. Defendant's letter of the 18th inst. passed him on the way and he had no knowledge of its having been written when he arrived at Rhinelander. On the 19th *Wilbur* and the defendant spent most of the day together making arrangements for the shipping of the house ice, but the defendant said nothing to *Wilbur* about having written the letter of the 18th. During the day *Means* brought up the subject of the $500 payment on the house-ice contract. *Wilbur* said "We will go over to the bank and fix it up." They went to the bank. *Wilbur* asked for a blank check, but they had none. He then asked for a blank draft, filled it out in the form of a draft by defendant *Means* on plaintiffs, and had *Means* sign it. The draft was handed to the cashier, who asked *Means* whether he wanted the draft cashed or whether he wanted it collected in due course. *Means* said it made no difference, as he did not need the cash, and it was agreed that it should be collected in due course. The draft went through and was paid in due course, less twenty-five cents for collection charges. The amount due on the stack ice was also talked over, and it was agreed that *Means* should send a statement of the amount due and that plaintiffs would send a check therefor. *Means* manifested no anxiety concerning the balance due on the stack ice. He had sent no statement to plaintiffs of the amount due, and the only data plaintiffs had with reference thereto were the individual invoices of each car shipped, and at least one of these failed to disclose the amount of ice in the car. *Wilbur* left Rhinelander on the night of the 19th, arrived in Waukesha on the evening of the 21st, which was Saturday, and did not go to his office until the morning of Monday the 23d, when he first discovered *Means's* letter of the 18th. Defendant resumed shipments of the house ice and shipped one car each day on June 20th, 23d, and 24th. On June 25th his attorney addressed to P. V. Buckley the following letter:

"*Mr. P. O. Means* has just been in to see me regarding a

paper signed by you and him at Rhinelander on the 2d day of April, 1919. This paper evidently was intended to be a contract for the sale of certain ice whereby you agreed to pay him $500 as a part payment on or before the 15th of June, 1919, and to make further satisfactory arrangement for the payment of the balance upon the receipt by you of the railway weights.

"*Mr. Means* informs me that you did not pay the $500 on or before June 15th, nor did you pay the amount until he was forced to deposit a sight draft against you. If his statement is correct, then your failure to pay the $500 on or before June 15th voided this paper as a contract. *Mr. Means* therefore wishes me to inform you that he does not care to complete the terms of the paper signed by you and him on the 2d day of April and he herewith wishes me to notify you that the terms of this paper are at an end so far as furnishing you any more ice as called for therein."

Upon receipt of this letter on June 27th *Wilbur* telegraphed *Means:*

"Smith letter to *Buckley* does not interest us as the agreement I made with you is the one that holds good. You had better ship as agreed and go tell your lawyer the whole fact and that I have a witness to agreements made in hotel, otherwise we shall start suit for judgment immediately."

And on the same day he wrote *Means* as follows:

"Inclosed find our check for $200 to apply on account. Kindly acknowledge same. Also let us know if you have any trouble getting refrigerator cars."

This letter was returned by *Mr. Means* with the following notation on the bottom: "*Mr. Wilbur:* Returning check; will send you statement of full acct. *P. O. Means.*" Thereafter this action was commenced.

The jury returned the following verdict:

"(1) On June 19, 1919, when defendant accepted the sight draft for $500 as the first payment provided for on the contract for 'house ice,' was said draft accepted on condition that plaintiff should promptly pay the balance then due on the 'stack ice' which had been shipped? *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer this: Did the plaintiffs make prompt payment of the balance due on the 'stack ice'? *A.* No.

"(3) On June 25, 1919, had more than a reasonable time elapsed for the making of payment by plaintiffs for the cars of ice shipped June 16th, 17th, and 18th after receipt by plaintiffs of the railroad weights? *A.* Yes.

"(4) On June 25, 1919, what was the market price per ton of good quality of ice loaded on cars at Rhinelander, Wisconsin? *A.* $4."

Upon this verdict judgment was rendered in favor of the defendant and against the plaintiffs in the sum of $121.01, from which judgment plaintiffs appealed.

For the appellants there was a brief by *M. A. Jacobson* of Waukesha, and oral argument by *D. B. Malone* of Waukesha.

Charles F. Smith, Jr., of Rhinelander, for the respondent.

OWEN, J. The jury found that the defendant accepted the sight draft for $500 as a first payment on the house-ice contract on condition that plaintiffs should promptly pay the balance then due on the stack ice and that the plaintiffs did not promptly make payment of such balance. This finding was essential in order to constitute the delinquency of the plaintiffs, if any, in making payment for the stack ice a breach of the house-ice contract. We have carefully searched the record for evidence to sustain this finding of the jury, but we are unable to find a scintilla of evidence to support it. On the contrary, the evidence, taken as a whole, to our minds, negatives any such understanding. There is not a word of evidence indicating that the defendant *Means* entertained any anxiety or dissatisfaction because of the unpaid balance on the stack ice, or that at any time he was pressing for payment. His letter of June 12th, in which he states that they would "load the last car of stack ice tomorrow," does not suggest any dissatisfaction on his part

in such respect, but indicates his willingness and purpose to immediately commence shipment on the house-ice contract. He says: "I have received several communications from you and will try to ans. at least some of them," which is a tacit admission of his own delinquency in replying to communications received by him from the plaintiffs. He admits that one bill of lading did not indicate the weight of the ice in one car, from which it conclusively appears that plaintiffs did not have at hand the data upon which to compute the amount due defendant on the stack-ice contract. That he had not sent them a statement of the amount due on this contract as late as June 27th is indicated by his notation at the foot of plaintiffs' letter to him under date of June 27th, where he said: "Returning check; will send you statement of full account." Furthermore, defendant does not claim in his testimony that he stated or intimated to *Wilbur*, on the 19th, that the receipt of the draft for $500 was conditional upon the prompt payment of the amount due upon the stack-ice contract, or that he was in any manner concerned about the unpaid balance. We therefore conclude that this part of the special verdict cannot stand.

A breach of the contract on the part of plaintiffs excusing defendant from further performance must rest solely upon the finding of the jury in response to the third question of the special verdict, which was to the effect that on June 25, 1919, more than a reasonable time had elapsed for the making of payment by plaintiffs for the cars of ice shipped June 16th, 17th, and 18th after receipt by plaintiffs of railroad weights. Granting that an unreasonable time did elapse, a breach of the contract is not the necessary or inevitable result. It depends "on the terms of the contract and the circumstances of the case." Sub. 2, sec. 1684*t*—45, Stats.; *Ambler v. Sinaiko*, 168 Wis. 286, 170 N. W. 270. The question is therefore whether, under the terms of the contract and all the facts and circumstances, the failure of plaintiffs to pay for the ice shipped on June 16th, 17th, and

18th authorized the defendant to treat the contract as breached on the part of the plaintiffs and to refuse to make further delivery on June 25th. It is not entirely plain whether the $500 cash payment was to be an advance payment to be applied on the first shipments or whether it was to be a payment in the nature of security for the entire contract, to be retained by defendant and applied on the last shipments. The circuit judge construed the contract to mean the latter. Without expressing any opinion thereon we will, for present purposes, assume that to be the proper construction.

We have now to take into consideration the provision of the contract calling for "satisfactory arrangements for the payment, at the conclusion of which defendant wrote plaint- P. J. Buckley or his assigns of railroad weights" at the time of making the $500 payment, and the prior course of dealing between the parties under the stack-ice contract, which was very similar. We have seen that $100 was paid down on the stack-ice contract; that the first car of ice shipped was paid for immediately, but the remainder of the stack ice, amounting to $249.48, was shipped without further payment, at the conclusion of which defendant wrote plaintiffs that he would immediately start shipment upon the house-ice contract. There was no protest of past practices, no withdrawal of credit, and no indication that a different manner of payment was expected. In view of the course of dealing between the parties under the stack-ice contract and the interview between *Wilbur* and *Means* on the 19th of June, it is clear to us that plaintiffs had a right to assume that similar dealing with reference to the house-ice contract was satisfactory to the defendant. In view of this course of dealing it was the duty of the defendant to bring home to plaintiffs the fact that he expected prompt payments for each car of the house ice shipped, if it was his intention to insist and rely upon that construction of the contract. Granting that he had a right to insist upon that manner of

payment, he could not lead the plaintiffs to believe that the former course of dealing was satisfactory and, without advising them to the contrary, insist upon a breach of the contract without demanding or requesting a different method of payment. It is therefore our conclusion that the defendant waived his right (if any he had) to insist upon a breach of the contract by reason of the failure of plaintiffs to make prompt payment upon each car shipped, and that he had no right to refuse further deliveries as he did on the 25th day of June. It follows that plaintiffs are entitled to recover their damages by reason of the failure of defendant to deliver the ice pursuant to the terms of the contract, and the judgment must be reversed, and the cause remanded with instructions to enter judgment in favor of plaintiffs and against defendant for the difference between the amount of their damages, computed upon the market price of ice loaded on cars at Rhinelander, as found by the jury, and the amount due defendant for ice shipped.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment for plaintiffs for the amount of their damages as indicated in the opinion.

CHAFEE LAND COMPANY, Respondent, vs. SUMPTION and another, imp., Appellants.

April 7—May 4, 1920.

Mortgages: Several notes secured by one mortgage: Transfer of notes: Assignment of security as an incident: Parol agreement as to priority of notes: Effect on holders in due course.

1. Where land was sold and a mortgage and notes were executed for the purchase price, part of the notes being given to brokers as commission for the sale under a verbal agreement that the note retained by the seller should have priority in the security given, transferees in due course and for value of the notes given the brokers were entitled to a *pro rata* interest in the proceeds realized on foreclosure, the security passing with the notes.

2. The parol agreement that the seller should have a prior right to the proceeds realized on a foreclosure sale of the premises could not be shown in a foreclosure proceeding, because it was evidence which would in effect vary and contradict the notes and mortgage.

APPEAL from part of a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed.*

This action was brought to foreclose a real-estate mortgage, all of the defendants being in default except the defendants *Sumption* and *Knappcn,* who appeared and were made defendants as the unknown assignees of defendant McGrath.

About April 30, 1918, defendants Eby and McGrath, real-estate dealers and brokers, proposed to purchase for defendant Clark certain land belonging to the *Chafee Land Company.* The price was to be $10 per acre, to be paid on or before five years, interest at six per cent. to be paid semi-annually, and all taxes to be paid annually. The *Chafee Land Company* accepted the proposition and promised Eby and McGrath that they should have any sum they could obtain from Clark over $8 per acre. Eby and McGrath completed the deal with Clark at $10 per acre, and on April 30, 1918, the *Chafee Land Company* conveyed the land to Clark by warranty deed, and as part of the same transaction took from Clark and wife one note for $29,566.88, representing the purchase price of the lands at $8 per acre, and took three other notes representing the $2 per acre which Eby and McGrath were to receive under the contract with the respondent for effecting the sale. The notes were all dated the same day and were payable on or before five years after date, falling due at the same time, and all secured by the mortgage in suit. Respondent transferred to Eby and McGrath the notes representing the $2 per acre, indorsed "without recourse." At the time of the execution and delivery of these notes and mortgage by the plaintiff to Eby and McGrath it was agreed and understood that, if

Clark failed to pay the notes and plaintiff was obliged to take back the land by foreclosure proceeding or otherwise, then these notes so turned over to Eby and McGrath should not share *pro rata* in the security of the mortgage, but that the plaintiff should have a prior and superior claim in such security for the amount due it, and that the mortgage security as to the amounts due on the notes transferred to Eby and McGrath should be subordinate and subject to the prior right of the plaintiff to secure payment of its note for $29,566.88 with interest.

Clark defaulted in payment of interest and taxes, whereupon respondent exercised the option provided in the mortgage to declare the whole amount of its note and mortgage due, gave notice thereof to the mortgagors, and brought suit to foreclose. Eby and McGrath were made parties and charged as subsequent incumbrancers. McGrath, prior to the commencement of the suit, had transferred the notes turned over to him, one to *H. L. Sumption* and one to *Theodore Knappen,* who took them in due course for value and without notice of the agreement that such notes were subordinate to the security of the mortgage.

The case was tried before the court. Judgment of foreclosure was entered in favor of the plaintiff and as against defendants *H. L. Sumption* and *Theodore M. Knappen,* adjudging that the plaintiff has a priority in the security of the mortgage as against the defendants *Sumption* and *Knappen.* This is an appeal from the judgment in so far as it adjudges such priority.

For the appellants there was a brief by *Charles F. Smith* and *A. J. O'Melia,* both of Rhinelander, and oral argument by *Mr. Smith.*

For the respondent the cause was submitted on the brief of *S. S. Miller* of Rhinelander.

SIEBECKER, J. There is no dispute in the facts. The appellants *Sumption* and *Knappen* acquired by transfer, in due course and for value, the two notes in question. The

question is, As such holders of these notes are they entitled to share *pro rata* in the mortgage security, or are their claims thereto upon these notes subject and subordinate to the claim of plaintiff upon its note? By an oral agreement plaintiff and Eby agreed that in case of the foreclosure of this mortgage to secure payment on these notes the plaintiff should have priority in the security over the notes transferred to Eby and McGrath, representing the $2 per acre consideration paid by Clark for the land over and above the $8 per acre received by the plaintiff. The general rule in this state is that the transfer of these notes carried with it an interest in the security. *Franke v. Neisler,* 97 Wis. 364, 72 N. W. 887.

The trial court held that although the assignment of the notes in due course for value to *Sumption* and *Knappen* cut off all defenses to the validity of the notes, it did not do so as to the interest in the security, and that the law merchant has no application to the assignment of the security; that though the appellants are innocent holders of the notes for value, they acquired no greater or superior rights in the security than their assignor had at the time of the assignment, and hence their interest in the security is subject to the same defenses that existed against the security in the hands of the prior owners of the security. This conclusion runs counter to the law in this state. It was held in *Croft v. Bunster,* 9 Wis. 503, that the mortgage, in case of a transfer of notes secured thereby, passes as an incident to the note, and "It is the debt which gives character to the mortgage, and fixes the rights and remedies of the parties under it, and not the mortgage which determines the nature of the debt." The rights and remedies of the assignee under a mortgage were held to be co-extensive with those he has under the instrument evidencing the debt. *Cornell v. Hichens,* 11 Wis. 353; *Andrews v. Hart,* 17 Wis. 297.

In *W. W. Kimball Co. v. Mellon,* 80 Wis. 133, 48 N. W. 1100, it was held:

"The principle is that where the security passes to the

holder of a negotiable promissory note transferred before due, as an incident to the note, nothing is a defense to the security which would not in law be a defense to the note," citing.

There is nothing in the notes and mortgage transferred to appellants or in the indorsement without recourse to charge them with notice of any defense against the notes nor to put them on inquiry in reference thereto. In the *Kimball Case* it is declared that "Although the security may be mentioned in the note, that does not make it necessary for the purchaser to examine into the history of the security," citing. It necessarily follows that the appellants are entitled to the rights and remedies accorded in the law to holders in due course and for a valuable consideration of negotiable notes, and the court erred in receiving evidence of the parol agreement between plaintiff and Eby to the effect that plaintiff should have a prior, superior right to the proceeds realized on foreclosure sale of the mortgaged premises to the rights therein. This evidence in effect varied and contradicted the notes and mortgage. *Hackley Nat. Bank v. Barry,* 139 Wis. 96, 120 N. W. 275.

Appellants are entitled to judgment awarding them a *pro rata* interest in the proceeds realized on the mortgage security.

By the Court.—That part of the judgment appealed from is reversed, and the cause remanded to the circuit court with direction to award judgment as indicated in the opinion.

WINNER, Appellant, vs. WINNER, Respondent.

April 7—May 4, 1920.

Marriage: Annulment for fraudulent representations as to pregnancy.

The marriage of the plaintiff to the defendant, induced by the representation of the defendant that her pregnancy was due to intercourse with him, will be annulled when the pregnancy was in fact due to intercourse with another man.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action to annul a marriage on the ground of fraud. There is no dispute about the facts. About the 23d or 24th of October, 1918, plaintiff, twenty-seven years of age, had sexual intercourse with the defendant, eighteen years of age. At that time they were engaged and intended to be married the following July. Later defendant advised him she was pregnant as the result of the intercourse with him, and plaintiff, relying upon such statement, married her February 6, 1919. Five months and fourteen days from plaintiff's first intercourse with defendant, and on April 7, 1917, she gave birth to a fully developed full-term child. Plaintiff was in the army and had no access to defendant until a few days prior to their first intercourse and the trial court found that plaintiff was not the father of defendant's child. After the birth of the child the plaintiff refused to cohabit with defendant or to support her, and sent her and the child back to her parents.

The trial court held that plaintiff was not entitled to an annulment of the marriage, and from a judgment entered accordingly he appealed.

For the appellant there was a brief by *G. M. & H. M. Perry* of Black River Falls, and oral argument by *H. M. Perry.*

L. Olson Ellis of Black River Falls, for the respondent.

VINJE, J. It appears from the evidence that plaintiff and defendant first became acquainted in July, 1917, engaged in August, 1918, and expected to be married in July, 1919. On the 16th day of October, 1918, plaintiff returned home from army service to attend his brother's funeral, and it was during his stay of a couple of weeks at home that he had intercourse with the defendant, he claims at her solicitation or advances, and she practically admits that. Both parties had been residents of Jackson county since birth, but whether near neighbors or not does not appear.

The trial court was of the opinion that under the rule of *Varney v. Varney,* 52 Wis. 120, 8 N. W. 739, and foreign cases hereinafter referred to, plaintiff was not entitled to a decree of annulment of the marriage and dismissed the complaint upon the merits. Its conclusion of law was "that as plaintiff was criminally intimate with the defendant before marriage he does not come into court with clean hands, and the court will not grant the relief prayed for because of such unlawful sexual intercourse."

Sec. 2351, Stats. 1919, provides that

"A marriage may be annulled for any of the following causes existing at the time of marriage: . . .

"(4) Fraud, force, or coercion, at the suit of the innocent and injured party, unless the marriage has been confirmed by the acts of the injured party."

So we have the question presented whether the marriage should be annulled because of the fraud of the defendant in concealing the fact that her pregnancy was by another man than plaintiff and in assuring him and causing him to believe that he was the cause thereof. No court, so far as our examination of cases has gone, has denied relief on the ground that plaintiff has not come into court with clean hands because of his illicit intercourse with defendant before marriage, except the New Jersey court in *Seilheimer v. Seilheimer,* 40 N. J. Eq. 412, 2 Atl. 376, which bases its

decision partly on that ground and partly on the ground of the confirmation after the marriage and after the discovery of the fraud. Such intercourse is a mere misdemeanor, and as to that both parties are usually equally blamable. In this case the defendant certainly as much as the plaintiff, because she admits she invited it. But the illicit intercourse is not the gravamen of the action. The prior pregnancy and the concealment thereof constitute the gist of the complaint, and as to those acts the injured plaintiff is wholly innocent. So it is not a case where the parties are *in pari delicto* and must be refused relief on that ground. Neither complains of the illicit intercourse between them. And his sharing therein ought not to render him a judicial outcast to the extent of denying him relief from one of the worst frauds that can be imposed upon any one.

Where relief has been denied in such cases, meaning cases where the woman has had illicit intercourse with her husband before marriage, but without his knowledge has been pregnant by another man at the time of her marriage, it has been on the ground that by reason of his illicit intercourse with the woman before marriage plaintiff has been apprised of her easy virtue and he has been put upon inquiry relative thereto, and failing to make such inquiry he has been held negligent and has foreclosed himself from saying that he believed her representations that he was the cause of the pregnancy. Such was the case in *Foss v. Foss,* 12 Allen (Mass.) 26,—the case that has led to the denial of relief in many cases where the facts were quite different and which later cases would probably have been differently decided had the relation between the facts and the ground of the decision in the *Foss Case* been clearly perceived. It is there stated that

"After a very brief acquaintance with the defendant, during which he had visited her only two or three times, he had carnal knowledge of her person; that this took place between

two and three months prior to the solemnization of the marriage; that he well knew before the execution of the contract by the marriage that she was pregnant with child, but was told by her that she was with child by him, and that he did not know or suspect that she had had sexual intercourse with any other man." Page 29.

The court there says:

"The difficulty is not that adequate cause for a decree of nullity is not set forth in the libel, but that the evidence entirely fails to support the essential allegations on which a sentence annulling the marriage for the cause set forth must be based." Page 27.

The failure of proof consisted in failing to satisfy the court, under the facts in that case, that plaintiff had a right to rely upon representations of defendant that she was with child by him. The facts in that case were that he had known her but a short time; that at their second or third meeting he had sexual intercourse with her. It does not appear that they were engaged when the intercourse took place. Under such a state of facts the court might well reach the conclusion that he ought not to rely upon her statements that she was pregnant by him. But in the case at bar the parties had known each other for years, were engaged to be married, and had set the month of the marriage date. To say that under such circumstances the man has no right to rely upon the woman's statements that he is the father of the child she is bearing, and that he must make inquiry elsewhere as to her chastity, is to negative all virtue, all truthfulness, and all decency in every woman that may have been imprudent enough to anticipate with her lover the rights of the marriage relation. Such a lapse from good morals should not be held destructive of every ethical instinct of the woman and render her unworthy of belief as to assertions fraught with such serious import, and whose truth she alone knows. It does not follow that because a woman has consented to, or even invited, illicit relations

with her lover, whom she shortly expects to marry, that she has in the past been guilty of like conduct with others. Our faith in womanhood leads us to the conclusion that the former does not necessarily or generally imply the latter. Nor does such delinquency destroy integrity of character to the extent that truthfulness necessarily goes with it. Plaintiff had a right to rely upon the representations made to him by the defendant that he was the father of the child. Besides, what inquiry could a decent, honorable man make under such circumstances? The Massachusetts court suggests three lines of conduct: first, inquiry in the neighborhood where the woman lives; second, a medical examination; or third, waiting till the birth of the child to ascertain the fact of paternity. We respectfully suggest that neither line of conduct befits an honorable man and would not be resorted to by the average man. To do so would be at once to besmirch the reputation of the woman he intended to marry. He would conclusively prove his unbelief in her veracity; he would show to others that he had no faith in her chastity and would blacken her reputation as to that in the eyes of all to whom inquiries were directed; and, if he awaited the birth of the child, he might bastardize his own offspring and bring added disgrace to himself and wife. No right-minded man guilty of having wronged a woman or sharing a wrong with her would so act. He would do as plaintiff did in this case—marry her. That is the only honorable reparation possible—the only method of legitimatizing the offspring which he believes to be his and of saving the honor of the woman he has promised to marry. The act of marriage in such a case is not the result of negligent credulity, but of honorable motives to repair as far as possible wrongs inflicted or shared by him. Such conduct should be encouraged to the end that lesser wrongs be remedied instead of being followed by greater ones.

On the other hand, the concealment by the woman of the paternity of her child is a fault so grievous that there is no

excuse or palliation for it. By the fraud she foists upon her husband a spurious offspring which he must acknowledge as his knowing it not to be. He must nurture and maintain it and invest it with all the rights of legitimate children, including that of inheritance. Such a fraud is vital and goes to the essentials of the marriage relation. It is true, as stated in *Varney v. Varney,* 52 Wis. 120, 8 N. W. 739, that a man may be compelled to accept an unchaste wife, on the ground that there is no warranty as to health, wealth, temper, character, or previous chastity, but that does not go to the extent of holding that a husband must accept spurious issue. The marriage contract implies that the woman is in present condition to bear her husband children, at least so far as she knows. In such a case as we have she knows she cannot till the spurious issue is born. It has been held that a spouse infected before marriage with a venereal disease commits such a fraud upon the other who is not aware of it as to warrant an annulment of the marriage. *C—— v. C——,* 158 Wis. 301, 305, 148 N. W. 865. The carrying and the concealment of a spurious issue must be considered at least an equal fraud. The opportunity of a designing pregnant woman to choose her husband willy-nilly need only be mentioned to be appreciated if no relief is to be had from conduct such as defendant was guilty of in this case. If she is successful in seducing a man whom she desires to become the putative father of her bastard child, she can practically compel him to become such, especially if he be endowed with the instincts of true manhood.

An examination of some of the cases bearing upon the question for determination will disclose in most of them material facts different from those before us. Thus, in *Varney v. Varney,* 52 Wis. 120, 8 N. W. 739, the woman had given birth to a child which was dead before marriage. In *Sylvester v. Sylvester,* 180 Mich. 512, 147 N. W. 454, the court could not agree upon the material facts; but whatever they were as to illicit intercourse between the parties

before marriage, there was no question of the support of a spurious issue owing to the wife's miscarriage. The case of *Gard v. Gard* (Mich.) 169 N. W. 908, has settled the doctrine in that state in favor of annulment under the facts such as in the case at bar. In *Bryant v. Bryant,* 171 N. C. 746, 88 S. E. 147, L. R. A. 1916E, 648, defendant induced plaintiff to marry her by claiming she was pregnant by him when she was not pregnant at all, and annulment was denied. The same state of facts was present in *Fairchild v. Fairchild,* 43 N. J. Eq. 473, 11 Atl. 426, and the court refused to annul the marriage. In *Di Lorenzo v. Di Lorenzo,* 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, defendant claimed she had given birth to a child of which plaintiff was the father, during his absence from the state, and exhibited to him a child which was neither his nor hers. Annulment granted. In Iowa a statute provided that if a woman was pregnant by another without the knowledge of the man she marries, he is entitled to annulment of the marriage upon discovery of the fact. Held, the fact that he had illicit intercourse with her before marriage did not debar him from the benefit of the statute. *Wallace v. Wallace,* 137 Iowa, 37, 114 N. W. 527, 14 L. R. A. N. S. 544. The Massachusetts court has steadfastly adhered to the ruling and the ground thereof stated in *Foss v. Foss,* 12 Allen (Mass.) 26. See *Crehore v. Crehore,* 97 Mass. 330, and *Safford v. Safford,* 224 Mass. 392, 113 N. E. 181. For valuable notes on this subject see 18 L. R. A. 375 and L. R. A. 1916E, 650.

By the Court.—Judgment reversed, and cause remanded with directions to grant the divorce as prayed for in the complaint.

ROBERTS, JOHNSON & RAND, Appellant, vs. MACKOWSKI, Respondent.

April 7—May 4, 1920.

Statute of frauds: Acceptance of goods: Failure to notify seller of refusal to accept goods from carrier.

An acceptance which will take a contract of sale of goods of the value of more than $50 out of the statute of frauds (sec. 1684*t*—4, Stats. 1919), cannot result from passive or negative conduct; and failure of the purchaser to notify the seller, who has shipped the goods to him, that he will not take the same from the station or receive them, cannot raise an inference of acceptance.

APPEAL from a judgment of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Plaintiff is a manufacturer and jobber of boots and shoes at St. Louis, Missouri. Defendant is a retail merchant at Princeton, Wisconsin. October 31, 1917, defendant gave plaintiff's traveling salesman an oral order for merchandise amounting to $103.88. No written memorandum was signed by the defendant. The goods thus ordered were thereafter delivered by plaintiff to a common carrier at St. Louis, consigned to the defendant, and the consignment arrived at Princeton December 1, 1917. On November 10, 1917, a statement of the shipment was mailed to the defendant at Princeton. The defendant refused to receive the goods and never took them from the depot. On February 16, 1918, he wrote to plaintiff as follows:

"Your statements and letters of different dates to hand and beg to notify you that the shipment of shoes is at depot. I have refused to accept same, arriving in broken condition, some of the goods being taken out of boxes broken open and have not been at the depot to check up and report to you. I admit I have been slow in attending to it on account of my time being well taken up with the store and electric light department, although I promise you I shall take time to investigate and report the shortage at once."

On April 20th he wrote a collection agency, to whom the claim had been given for collection, as follows:

"The goods are at the C. & N. W. Ry., rejected on account of arriving in bad condition upon their arrival. I have looked the goods over and they are not in shape to be put in stock."

On April 23d he wrote to plaintiff as follows:

"Your telegram has duly been received asking for check, and beg to say that the goods have been rejected upon their arrival. Judging from the appearance of the boxes, same must have been opened, as some of the cartons are broken and one pair misses' shoes the tip squashed in.

"I did go down to the depot and looked same over as promised, and find that I cannot use the goods, so kindly inform the railway company to have them returned to you."

An action to recover for the goods was brought in justice's court, and from a judgment in favor of the plaintiff the defendant appealed to the circuit court. The case was tried before the court, and a judgment rendered in favor of the defendant, from which plaintiff brings this appeal.

For the appellant the cause was submitted on the brief of *George E. Dickenson* of Markesan.

For the respondent there was a brief by *Lehner & Lehner* of Oconto Falls, and oral argument by *Philip Lehner* of Princeton.

OWEN, J. The action was brought to recover on an oral contract for the sale of goods amounting to more than $50. The defendant claims that the contract is void under the statute of frauds. The question presented is whether there was such an acceptance or receipt of the goods on the part of the defendant as to take the contract out of the statute. Sub. 1, sec. 1684*t*—4, Stats., provides that

"A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold,

and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Sub. 3 of that section provides:

"There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

Leaving out of discussion the question of whether the silence of defendant from December 1st to February 16th can be construed as conduct amounting to his assent to becoming the owner of the goods, we find nothing in the record which can satisfy the requirement of the statute that he actually received the same. As said in *Friedman v. Plous*, 158 Wis. 435, 149 N. W. 218:

"The statute . . . seems to separate acceptance from receipt and provide that the former requirement may be satisfied by words or conduct, while the latter presupposes a delivery by the seller and requires some intentional act of receipt on the part of the purchaser."

Obviously there can be no actual receipt on the part of the purchaser in the absence of some affirmative action on his part. Actual receipt cannot result from passive or negative conduct. At all times the defendant consistently and persistently refused to receive the shipment. There was no conduct on his part amounting to an actual receipt of the goods or as indicating any intention entertained by him to receive them. The contract was therefore void under sec. 1684*t*—4 as well as under sec. 2308, Stats.

Appellant relies upon the principle that where property is delivered by one person to another in fulfilment of an executory contract between them requiring such delivery, and the latter neglects to notify the former that the property is not accepted as complying with the contract within a reasonable time and after a fair opportunity to accept it, an acceptance

will be inferred. He argues that under this principle, together with the further rule that delivery to a common carrier is delivery to the consignee, it was the duty of the defendant to notify the plaintiff of his refusal to accept the law. While that argument is pertinent where there is a valid contract of sale, it cannot be invoked to validate a void contract when such validation requires affirmative action on the part of the vendee.

By the Court.—Judgment affirmed.

shipment, and that because he did not do so within a reasonable time his receipt and acceptance follow as a matter of

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RICKERT, Appellant, vs. PREHN, Respondent.

April 7—May 4, 1920.

New trial: Insufficiency of evidence: Unsatisfactory proof of values: Discretion of court: Setting aside verdict unless plaintiff consents to reduction of damages.

In an action to recover compensation by a broker who was the procuring cause of an exchange of land for a stock of goods, under an agreement whereby the owner of the land was to receive a net price or value therefor, the court did not abuse its discretion in granting a new trial after verdict for plaintiff, where the evidence as to the value of the stock exchanged for the land was unsatisfactory and was based upon superficial estimates made from three weeks to nine months from the time of the trade.

APPEAL from an order of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover compensation for services rendered defendant in securing a trade of his farm for a stock of goods and fixtures owned by one McKinnon, a resident of Chicago. Plaintiff alleges that defendant agreed to pay him one half of all he received in excess of $10,500 for his farm; that by the trade consummated defendant received a stock of goods and fixtures worth $13,000 for his farm, subject to a mort-

gage of $4,800, or in all $17,800, being $7,300 in excess of the $10,500; that one half of said sum of $7,300, or $3,650, is due plaintiff.

Defendant admits that at one time he agreed to pay one half in excess of $10,500 received for the farm, but alleges that such agreement had been abandoned and denies that plaintiff procured or assisted in the sale; alleges he gave his farm, reasonably worth $10,500, subject to a mortgage of $4,800, and $2,000 in personal property, for a stock of goods and fixtures worth $6,500 and two lots worth $500.

The jury found (1) that plaintiff was the procuring cause in the trade with McKinnon; (2) that the fair market value of the stock of goods received by defendant was $8,000, of the fixtures, including cash register and safe, $4,470; that the defendant traded in personal property worth $1,500; and (3) that no new agreement as claimed by defendant, to the effect that if McKinnon would guarantee an inventory of the stock of goods of the value of $8,000 the defendant would pay plaintiff a commission of $1,000, was made between them when plaintiff was in Chicago.

After the verdict, upon defendant's motion, the court set aside the verdict and ordered a new trial unless plaintiff consented to take judgment for $400 and costs. Plaintiff refused to take judgment for $400 and costs, excepted to the order, and appealed therefrom.

For the appellant there was a brief signed by *L. E. Lurvey*, attorney, and *D. D. Sutherland*, of counsel, both of Fond du Lac, and oral argument by *Mr. Sutherland*.

L. J. Fellenz of Fond du Lac, for the respondent.

VINJE, J. No question of law is involved in this case. The court set aside the verdict and granted a new trial because the evidence as to the value of the stock of goods and fixtures at the time the trade was made, to wit, September 5, 1917, was so vague and unsatisfactory that it did not sup-

port the verdict. The stock consisted of dry goods, boots and shoes, ladies' furnishings, notions, and five and ten-cent goods. On August 14 or 15, 1917, the parties, for a part of a day, examined the stock of goods and fixtures but made no inventory. Plaintiff estimated the stock worth $8,000 and the fixtures $4,800. Then defendant valued the stock at about $6,000. He says that between August 15th and September 5th McKinnon sold daily from the stock and did not replenish it, so that at the time the trade was made the stock was worth less. The cross-examination of plaintiff showed that his knowledge of the quantity and quality of the stock at the time he made the examination was very limited and superficial. The other evidence as to the value of the stock was equally unsatisfactory and was based upon superficial estimates made from three weeks to nine months from the time of the trade. Under the circumstances we cannot say that the trial court abused its discretion in granting a new trial. Its conclusion that justice had not been done in the case is fully sustained by the evidence.

By the Court.—Order affirmed.

SCHRADER, Plaintiff, vs. GUNDECK, Appellant: MARYLAND CASUALTY COMPANY, Assignee, Respondent.

April 8—May 4, 1920.

Garnishment: Defense of garnishment action by principal defendant: Defenses available: Validity of judgment in principal action.

1. Under sec. 2765, Stats. 1919, authorizing the defendant to defend proceedings against a garnishee on the ground that the indebtedness is exempt, or for any other reason is not liable to garnishment, or upon any ground upon which a garnishee might defend the same, the defendant cannot interpose any defense which the garnishee could not interpose.
2. The defendant, like the garnishee, may defend against the garnishment in aid of execution on the ground that the court

had no jurisdiction to render judgment in the principal action; but if such judgment was rendered by a court having competent jurisdiction so as to be a protection to the garnishee, mere irregularities are not available, nor can the issues in the principal action be relitigated.

APPEAL from an order of the circuit court for Green Lake county: MARTIN L. LUECK, Judge. *Affirmed.*

Garnishment. July 22, 1915, plaintiff began suit against C. E. Smith, the Kingston Dairy & Farming Company, and *John Gundeck*. At the same time a writ of attachment was issued by virtue of which certain property belonging to defendants or some of them was seized by the sheriff of Green Lake county, and on the same day the *Maryland Casualty Company* executed on behalf of all the defendants a statutory undertaking for a release of the property attached. Each of the defendants appeared by the same attorneys, and each separately answered the complaint. The case was noticed for trial at the January, 1916, term of the circuit court for Green Lake county. The case was reached in its regular order and judgment was entered by default against all of the defendants, the *Maryland Casualty Company* being bound on account of its undertaking for a release of the attached property. The attorneys for the defendants procured an order returnable on February 3, 1916, requiring plaintiff to show cause why the judgment should not be opened up and set aside and the defendants allowed to interpose their defense. Upon the hearing the defendants' motion was denied. From this order an appeal was taken, but never prosecuted. The plaintiff then caused an execution to be issued against the defendants, which was returned unsatisfied, and thereafter, under an *alias* execution, the sheriff demanded of the *Maryland Casualty Company* that it pay the judgment. The judgment, with interest and sheriff's fees, was paid, amounting to $1,423.47. Thereafter the defendant *John Gundeck* separately moved that the judgment be set aside, which motion was also denied.

Subsequently a receiver was appointed upon proceedings properly had, for the purpose of having applied to the satisfaction of the judgment certain property claimed to belong to the defendant *Gundeck*. Thereafter garnishment proceedings in aid of execution were begun against the Kingston Creamery Company. In the garnishment proceedings the defendant *Gundeck* appeared and answered, alleging that the funds in the hands of the Kingston Creamery Company were exempt, and also answered by way of counterclaim, in which the facts hereinbefore referred to regarding the progress of the litigation are set out in considerable detail. It is further alleged that the defendant C. E. Smith is the son-in-law of the defendant *Gundeck;* that *Gundeck* and his wife are inexperienced in business matters; that Smith was in fact a professional crook, who had served a term in the Wisconsin state prison, of which the defendant *Gundeck* had no knowledge until after the suicide of C. E. Smith; and alleged further that said judgment is wholly without merit and unjust as against the defendant *Gundeck,* that it would never have been rendered against the defendant if his interests had been properly defended and protected by his attorneys, and prayed judgment against the *Maryland Casualty Company* permanently restraining it from further attempting to collect the said judgment or from assigning or transferring the judgment, and for other relief. To this counterclaim the *Maryland Casualty Company* demurred, the proceedings to enforce the judgment being carried on by the *Maryland Casualty Company* in the name of the plaintiff. From an order sustaining the demurrer the defendant *Gundeck* appeals.

For the appellant there was a brief by *Lehner & Lehner* of Oconto Falls, and oral argument by *Philip Lehner* of Princeton.

For the respondent the cause was submitted on the brief of *Bloodgood, Kemper & Bloodgood,* attorneys, and *Albert K. Stebbins,* of counsel, all of Milwaukee.

ROSENBERRY, J. The trial court sustained the demurrer to the counterclaim upon the ground that the matters therein set out are not pleadable as a counterclaim. Sec. 2765, Stats., provides:

"The defendant may, in all cases, by answer duly verified, to be served within twenty days from the service of the garnishee summons on him, defend the proceedings against any garnishee upon the ground that the indebtedness of the garnishee or any property held by him is exempt from execution against such defendant or for any other reason is not liable to garnishment; or upon any ground upon which a garnishee might defend the same."

The question arises, Can a garnishee defend upon the ground that the judgment in the main action is unjust or inequitable as to the principal defendant? Unless a garnishee may make such a defense the defendant may not do so, because by the wording of the statute he is precluded therefrom. The statute specifies the grounds upon which the defendant may defend the garnishment proceedings. He may defend only upon the specified grounds, other defenses, if such there be, being under familiar rules excluded. While it is true that the relief prayed for is a judgment *in personam,* the basis of the judgment so prayed for, if rendered, would be the invalidity of the judgment in the main action, assuming that the counterclaim states a cause of action for equitable relief, and waiving the question of whether or not the matters set out in the counterclaim are *res adjudicata* (*Ketchum v. Breed,* 54 Wis. 131, 11 N. W. 238), we are of the opinion that they cannot be pleaded as a defense in the garnishment proceedings. For the reason that a garnishee will not be protected in the payment of a judgment which is void for want of jurisdiction, he may inquire into the regularity of the proceedings in the principal action, and set up as a defense that the judgment in the main action is void for want of jurisdiction, but where the court has obtained jurisdiction mere irregularities are not available.

Judgment in the garnishment proceedings presupposes a valid judgment against the defendant in the main action. *Beaupre v. Brigham,* 79 Wis. 436, 48 N. W. 596; *Frisk v. Reigelman,* 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766; 20 Cyc. 1074.

The matters set out in the counterclaim show that the court had jurisdiction to render the judgment in the main action, and furthermore that the same facts were presented to and passed upon by the court, and the defendant, as well as the garnishee, is in no position to relitigate in a garnishee action the matters set out in the counterclaim. The trial court was right in holding that the facts so alleged were not pleadable in the garnishment proceedings.

If the matters alleged in the counterclaim are true, and the defendant *Gundeck* is compelled to pay the judgment, it may be that an injustice will be done him. It has been suggested that the cause should be remanded in some manner that would permit a trial upon the merits, but in the present situation of the case that is impossible. The issue presented is not triable in any court in a garnishment proceeding.

By the Court.—Order affirmed.

KALASHIAN, Respondent, vs. HINES, Director General of Railroads, Appellant.

April 8—May 4, 1920.

Railroads: Federal employers' liability act: What law governs: Questions for jury: Contributory negligence: Effect on damages: Assumption of risk: Negligence of fellow-servant: Appeal: Issues not controverted at trial: Submission of unnecessary question harmless error.

1. At the trial of an action by an employee of a railroad for injuries, a suggestion by the court, acquiesced in by defendant, that it was sufficiently shown that a certain transfer track was used indiscriminately for interstate commerce,

indicates that this fact was not disputed, and the question cannot be raised by the defendant on its appeal from a judgment in favor of plaintiff.

2. A railroad employee, injured while engaged in repairing a track which was an instrumentality in interstate commerce, had a right to recover under the federal employers' liability act (35 U. S. Stats. at Large, 65, ch. 149) rather than the state workmen's compensation act.
3. In actions under the federal employers' liability act, questions of the injured employee's or defendant employer's negligence in connection with the injury are controlled by the principles declared by the federal rather than by the state courts.
4. In an action under the federal act by a railroad sectionman for loss of his legs when run over by a switch engine, questions of negligence on the part of the crew in charge of its switching engine are for the jury under conflicting evidence.
5. The evidence in this case is *held* to show that plaintiff, who, after seeing the engine, paid no further attention to it while crossing the track diagonally on his way to a handcar with a load, was negligent; and also to justify a finding that there was a want of ordinary care in the management of the switch engine by the switching crew at the time of the injury which was the proximate cause of the accident.
6. Under the federal act, negligence of the injured employee proximately contributing to his injury merely diminishes proportionately the amount of his recovery for the negligence of his employer, also so contributing; and although the employee himself was negligent, negligence by the railroad also having been found, his negligence cannot be deemed the sole proximate cause of his injury.
7. Under the federal act there is no assumption of risk of the negligence of a fellow-servant by a co-employee until at least actual knowledge of such particular negligence is brought to his attention, or it is so obvious that an ordinarily prudent person would observe it.
8. Error in the submission of two questions of a special verdict which were unnecessary to determine the rights and liabilities of the parties, is harmless and would not warrant the reversal of a judgment for plaintiff.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The plaintiff, a railroad sectionman in defendant's employ, was on May 20, 1918, at about half-past 3 o'clock

in the afternoon, in defendant's yard at North Fond du Lac, run over by a switch engine, losing both legs. He was about thirty-seven years of age, by birth an Armenian, and had been in this country five years. He was able to talk but slightly, if any, in any language than that of his birth, and could not read or write. He had been employed as sectionman for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company for about three months prior to the injury and had had about four years' experience as such sectionman.

In the switch yards in question there were maintained three main lead tracks running substantially north and south at a point where they were diagonally intersected by a public highway called the Lake Shore drive. The yard was used for the breaking up and making up of freight trains, and the plaintiff was familiar with the situation and the use of said tracks, and during the period of his employment had been living in a bunk car within a few feet of the track and but a short distance from the point where he was injured. The ground at this location was level and there were no buildings or other obstructions to the sight so far as the switch engine in question and the location involved in this accident are concerned. On the afternoon in question the section crew with which he was working were required to load material and tools on their handcar at the place where it was then located south of the Lake Shore drive and just a little to the east of the most easterly of the tracks.

The foreman of the crew was in the tool house, which was located west of the tracks and just north of the Lake Shore drive, and the plaintiff was there given by such foreman a keg of railroad spikes, weighing about twenty-five pounds, which he carried in his arms in front of his body, at the same time having, as he testified, his maul on one arm. He was directed by the foreman to proceed in a hurry towards the handcar, at which were already one or

more of his fellow sectionmen. He started from the tool house in a southeasterly direction toward the handcar. As he stepped out of the tool house his testimony is to the effect that he looked to the north and saw the switch engine in question then coupled to several cars, but standing at a point at least sixty feet north of the said Lake Shore drive. The distance of the handcar was about 200 feet from the tool house. He did not look again toward the switch engine. Just as he was stepping over the west rail of the center of the three lead tracks and at a point 144 feet from the door of the tool house from which he started and from which he had been approaching the track at an angle of about thirty degrees, he was struck by the switch engine coming from the north, resulting in his injury. The switch engine with seven or eight cars attached stopped within about twenty-five feet after so striking the plaintiff. The point where the accident occurred was 119 feet south from the crossing of the center track with the Lake Shore drive, and the width of that highway was sixty feet.

The place where it was planned to go with the section crew of which plaintiff was a member, together with the material which was being taken to the handcar, was to a transfer track about 300 feet long between the Sault line and the St. Paul railway, about a mile and a half from where the accident occurred. The purpose in so going was to repair such transfer track, which had become out of order by reason of an engine having been derailed thereon.

Defendant's records were produced by plaintiff on the adverse examination of one of the defendant's clerks, and it appeared therefrom that, for a period of at least a month prior to the time of the injury, loaded freight cars received from points without the state of Wisconsin and consigned to firms in Fond du Lac were almost daily moved over such transfer track. After a number of such records had been offered on plaintiff's behalf the court then suggested to plaintiff's counsel: "Haven't you gone far enough with

this?" To which suggestion plaintiff's counsel acceded, and defendant's counsel said: "That is all." The court then said: "I don't see that there is any question about the proposition that this is a connecting track used indiscriminately for interstate purposes." No objection was interposed by defendant to such disposition of the question and no testimony was offered by defendant as tending to impeach or contradict the effect of such record testimony as to the transfer track being used for switching cars containing shipments of interstate freight.

But two of the several grounds of negligence alleged in the complaint were submitted to the jury by the trial court in the special verdict. By such special verdict the jury found as follows:

(1) The engine crew did not use ordinary care in respect to keeping a lookout ahead as they approached the plaintiff.

(2) The engine crew did not use ordinary care in respect to ringing the bell as they approached the plaintiff.

(3) That such want of ordinary care thus found was the proximate cause of plaintiff's injury.

(4) That there was a want of ordinary care on plaintiff's part that proximately contributed to produce his injury.

(5) That plaintiff's negligence contributed to his injury in the proportion of forty per cent. as compared to the total negligence of the engine crew and his own negligence.

(6) The plaintiff did not know that the engine crew were likely to move the engine south of the road without ringing the bell.

(7) The plaintiff did not know that the engine crew were likely to move the engine south of the road without keeping a lookout ahead.

(8) "Would a person of plaintiff's experience, information, intelligence, and knowledge of the English language have known, in the exercise of ordinary care, that the engine crew was likely to move the engine south of the road without ringing the bell? *A.* No."

(9) A question similar to No. 8, but inquiring as to the moving of the engine without keeping a lookout ahead, which was also answered No.

(10) Twenty-five thousand dollars will compensate the plaintiff for his injuries.

After respective motions by the parties the court directed a verdict in favor of the plaintiff for sixty per cent. of the amount of the verdict, with interest, costs, and disbursements. From the judgment entered in accordance therewith defendant has appealed.

For the appellant there was a brief by *W. A. Hayes* of Milwaukee, attorney, and a separate brief by *John F. Kluwin* of Oshkosh, attorney, and *Paul Stover* of Milwaukee and *T. L. Doyle* of Fond du Lac, of counsel; and the cause was argued orally by *Mr. Kluwin* and *Mr. Hayes.*

For the respondent there was a brief by *Barton & Kay* of St. Paul and *Walter D. Corrigan* of Milwaukee, and oral argument by *Mr. Corrigan.*

ESCHWEILER, J. The substance of appellant's contention on this appeal is that the court erred in its ruling on the following points:

(1) That the plaintiff was not so employed in interstate commerce as to bring his right of action within the federal employers' liability act and that his sole right was under the provisions of the workmen's compensation act of Wisconsin.

(2) In submitting to the jury any question as to alleged negligence on the part of defendant as a proximate cause of the injury and in sustaining their verdict in so finding.

(3). In failing to hold as a matter of law that the plaintiff's negligence was the sole cause of his injury.

(4) In failing to hold as a matter of law that the injuries which the plaintiff received were by reason of a risk which he had assumed under his employment.

(5) For the court's failure to submit a question in the special verdict as to the assumption of risk and in submitting questions (8) and (9) above specified and in failing to give appropriate instructions as to the assumption of risk and

giving erroneous instructions on the question of defendant's alleged negligence.

It must be considered as an accepted fact in this case that at the time of the injury the plaintiff was, within the scope of his employment, proceeding to the handcar for the purpose of immediately going with the rest of the section crew to repair a portion of the tracks used by the Sault Railway in interstate as well as intrastate traffic.

The evidence from defendant's own records as to the character of freight that was being transported practically daily over this transfer track, and further offer of such class of testimony being stopped at the suggestion of the court as quoted from the record, and the evident acquiescence by defendant's counsel at that stage of the case with the ruling of the court, makes it clear that it was not disputed on the trial and cannot now be urged that the track proposed to be repaired was not clearly an instrumentality used in interstate commerce. It was as much so as was the bridge at which the injured plaintiff was employed in carrying spikes in the case of *Pedersen v. D., L. & W. R. Co.* 229 U. S. 145, 33 Sup. Ct. 648, or where the injured employee was removing snow between tracks used for both kinds of traffic (*N. Y. Cent. R. Co. v. Porter,* 249 U. S. 168, 39 Sup. Ct. 188), and the ruling in those cases we consider binding upon us in the instant case. The following cases also are in point: *Louisville & N. R. Co. v. Parker,* 242 U. S. 13, 37 Sup. Ct. 4; *Southern R. Co. v. Puckett,* 244 U. S. 571, 37 Sup. Ct. 703; *Philadelphia, B. & W. R. Co. v. Smith,* 250 U. S. 101, 39 Sup. Ct. 396; *Frazier v. Hines,* 260 Fed. 874; *Kansas City S. R. Co. v. Martin,* 262 Fed. 241.

It is therefore held in this case that the plaintiff's right to recover was under the federal act rather than the Wisconsin workmen's compensation act, and the rulings of the court below in that regard were proper and are upheld.

In a case like this under the federal liability act, questions of either plaintiff's or defendant's negligence in connection

with the injury are controlled by the principles declared by the federal courts rather than those of the state courts. *Yazoo & M. V. R. Co. v. Mullins*, 249 U. S. 531, 39 Sup. Ct. 368; *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 371, 38 Sup. Ct. 535; *N. Y. Cent. & H. R. R. Co. v. Tonsellito*, 244 U. S. 360, 37 Sup. Ct. 620; *Southern R. Co. v. Gray*, 241 U. S. 333, 36 Sup. Ct. 558; *Frazier v. Hines*, 260 Fed. 874, 880. It may be said in passing, however, that no substantial difference appears in the rulings in this state upon the questions here involved and the rulings of the federal courts.

The case was correctly submitted to the jury under the evidence in this record as to the questions of the alleged negligence on the part of the crew in charge of the switching engine as embodied in the first and second questions of the special verdict.

The conflicting testimony in this case was such that it made it proper for the jury rather than the court to determine where the truth lay with reference to the following situations:

First, whether, when plaintiff started from the tool house towards the handcar in a diagonal direction leading to and across defendant's tracks, the switch engine was sixty feet or more north of the highway crossing, or whether it was just momentarily stopped on the crossing itself to permit of the very brief operation of uncoupling one or more cars from the set of cars then being switched; and whether it was in a state of rest at the time the plaintiff so started.

Second, whether or not the bell on the locomotive was ringing as the switch engine was going south and over the space between the highway crossing and the point of injury.

Third, whether it was the custom in this particular switch yard that a warning by the ringing of the bell should be given as such switch engines were in motion under circumstances similar to those shown in this case, or whether it was a custom restricted to the giving of such warning when the

engine was just starting to move, at highway intersections and when persons employees or others were discovered by the engine crew on the roadbed and at or near a point of danger.

It is a conceded fact under the plaintiff's own testimony that he was familiar with switching operations, the constant moving of switch engines up and down those tracks, and the likelihood of such engines being so in operation while he was so crossing the tracks, and that he did not look towards the switching engine after leaving the tool house. It must also be treated as a conceded fact that had he looked at or just before stepping upon or within two or three feet of the west rail of the center track he could have seen the approaching engine and have avoided the accident.

It also appears that the engine was backing to the south at the time of the accident and that the engineer was on the opposite side of the engine from that on which the plaintiff was approaching, and that the fireman was engaged in coaling the fire and had but a momentary glimpse of the plaintiff just as the latter was stepping into the zone of danger, and that he immediately gave notice to the engineer.

There is no escape from the conclusion on the testimony in this case, and a verdict to the contrary could not have been sustained, that there was negligence by the plaintiff proximately contributing to his injury.

The situation presented, however, was one in which the evidence can and does uphold a finding by the jury that there was a want of ordinary care in the management by the switching crew of the switching engine in question at the time of the injury which was a proximate cause of the accident. If the bell as a matter of fact did not ring,—and we surely cannot say under the testimony in this case as a matter of law that it did ring,—then a finding by the jury that such failure to ring was a want of ordinary care is a logical and legal conclusion.

There was no violation by defendant of the statutory re-

quirements as to the make-up of the engine crew; no negligence could be predicated on that ground. Momentary failure on the part of either or both the engineer and fireman to have a continuous, constant watch within a reasonable distance on both sides of the track ahead of the train also could not be considered of itself sufficient to warrant a finding of actionable negligence. *Shaffer v. M., St. P. & S. S. M. R. Co.* 156 Wis. 485, 495, 145 N. W. 1086.

The situation here, however, presents one where such switch engines are constantly moving up and down the tracks upon which or across which other employees are required by their employment to go upon or across. While this engine was proceeding a distance of about 120 feet from the center of the highway where the engine was standing, as testified to by defendant's witnesses, at the last time it stopped prior to the accident, or considerably more if it was north of the track as testified to by the plaintiff and his witnesses, the plaintiff was in plain sight carrying the keg of spikes and the maul, and approaching at a diagonal which if continued was bound to bring him within the zone of danger, and with his head turned in a direction more away than towards the approaching train.

We think, therefore, that however negligent he may have been himself in thus approaching the track, it was a proper consideration for the jury as to whether or not the defendant's train crew were also not negligent in failing to watch for and guard against injury to their fellow-servants, who in obeying lawful directions of their superior officers might reasonably be anticipated to occupy a position similar to that of plaintiff towards the moving train. *Norfolk & W. R. Co. v. Earnest,* 229 U. S. 114, 119, 33 Sup. Ct. 654; *Southern R. Co. v. Smith,* 205 Fed. 360; *Delaware, L. & W. R. Co. v. Hughes,* 240 Fed. 941; *Lehigh Valley R. Co. v. Scanlon,* 259 Fed. 137, 141.

Defendant insists that this case must be controlled in its favor by the ruling of the federal court in the case of

Aerkfetz v. Humphries, 145 U. S. 418, 12 Sup. Ct. 835. There the plaintiff, a track repairer, familiar with the manner of work, was injured by the slow movement of an engine pushing two cars against him, he standing with his back to the approaching cars at work without looking or watching for the engine. It was there held that there was no reasonable ground under the evidence to charge the duty on the engineer of expecting that an employee so stationed would pay no attention to his own safety. The court there expressed the opinion that the ringing of bells and sounding of whistles under such circumstances would have simply tended to confusion. That court held that there was no negligence by defendant, and that in any event the negligence of the plaintiff himself was such as to defeat his right of recovery. At the time of that decision negligence of a plaintiff proximately contributing to his injury defeated his right of recovery. Now under the federal statute the contributory negligence of a plaintiff so proximately contributing to his injury, there being also negligence by the defendant also so contributing, has no other effect than to diminish proportionately the amount of plaintiff's recovery. So long as the situation disclosed negligence on the part of both the plaintiff and defendant, each of which contributes in some degree as a proximate cause of the injury, it is a question only of the apportionment of the damages rather than a bar to the plaintiff's right of recovery. *Norfolk & W. R. Co. v. Earnest,* 229 U. S. 114, 122, 33 Sup. Ct. 654; *Grand Trunk W. R. Co. v. Lindsay,* 233 U. S. 42, 49, 34 Sup. Ct. 581; *Seaboard A. L. Ry. v. Tilghman,* 237 U. S. 499, 501, 35 Sup. Ct. 653; *Ill. Cent. R. Co. v. Skaggs,* 240 U. S. 66, 70, 36 Sup. Ct. 249; *N. Y. C. & St. L. R. Co. v. Niebel,* 214 Fed. 952; *Lehigh Valley R. Co. v. Scanlon,* 259 Fed. 137; *Ewig v. C., M. & St. P. R. Co.* 167 Wis. 597, 606, 167 N. W. 442, 169 N. W. 429.

We cannot consider that the facts here as to defendant's negligence are so parallel with those in the *Aerkfetz Case,*

supra, as to make that decision controlling here on either question involved.

That the plaintiff himself was negligent is beyond question, but, negligence by defendant having been found, the plaintiff's negligence cannot be deemed the sole proximate cause. *Union Pac. R. Co. v. Hadley,* 246 U. S. 330, 333, 38 Sup. Ct. 318.

This view of the situation disposes adversely to defendant of its main contentions on this appeal.

The failure to submit the question of assumption of risk was not error. The negligence of the defendant was that of a fellow-servant of plaintiff. As to such negligence there is, under the federal law, no assumption of risk by a co-employee until at least actual knowledge of such particular negligence is brought to his attention or it is so obvious that the ordinarily prudent person would observe it. *Erie R. Co. v. Purucker,* 244 U. S. 320, 324, 37 Sup. Ct. 629; *Chesapeake & O. R. Co. v. De Atly,* 241 U. S. 310, 315, 36 Sup. Ct. 564; *Chesapeake & O. R. Co. v. Proffitt,* 241 U. S. 462, 36 Sup. Ct. 620; *Lehigh Valley R. Co. v. Scanlon,* 259 Fed. 137, 142; *Kansas City S. R. Co. v. Martin,* 262 Fed. 241, 244; *Reul v. Wis. N. W. R. Co.* 166 Wis. 128, 134, 163 N. W. 189; *Ewig v. C., M. & St. P. R. Co.* 167 Wis. 597, 606, 167 N. W. 442, 169 N. W. 429.

Submission of questions (7) and (8) of the special verdict, quoted in the statement of facts, being of unnecessary elements under the issues requisite to determine the respective rights and liabilities of the parties, if error at all, was not such as would warrant a reversal of the judgment.

By the Court.—Judgment affirmed.

ESTATE OF SALZWEDEL.

April 8—May 4, 1920.

Wills: Bill of sale testamentary in purpose: Gifts: Delivery essential: Statute of frauds: Void contract as basis for quantum meruit: As measure of recovery: Appeal: Error not affecting party appealing.

1. A bill of sale of "all our personal property which we may possess at our death," conveys no present title and is purely testamentary, and, not being executed as required for the execution of wills, is ineffective.
2. In the absence of a delivery of property, the transaction did not amount to a gift, delivery being an essential element of a gift either *inter vivos* or *causa mortis*.
3. While a person rendering services for another which would otherwise be gratuitous may recover therefor on proof that they were rendered pursuant to an express promise or agreement to pay, though such promise or agreement was void under the statute of frauds, the recovery must be on *quantum meruit*, and the void contract may be invoked only for the purpose of rebutting such presumption and not for the purpose of measuring the recovery.
4. Where the administratrix of a mother's estate presented a claim against the estate of a deceased son, and his administratrix presented a claim against the mother's estate for the entire estate under a void agreement, and on trial of the consolidated claims the court adjudged that certain certificates of deposit belonged to another son, the question whether such certificates belonged to the mother cannot be reviewed on appeal by the administratrix of the deceased son, where the mother's administratrix did not appeal.

APPEAL from a judgment of the circuit court for Marquette county: BYRON B. PARK, Judge. *Affirmed.*

Gottlieb Salzwedel and Henrietta Salzwedel were the parents of Julius Salzwedel, *August Salzwedel*, and *Melvina Krueger*. On May 13, 1913, the parents conveyed to Julius a farm consisting of 120 acres of land of the value of $5,000, and on the same day Henrietta signed the following writing:

"For and in consideration of one dollar and other valuable consideration, I, Gottlieb Salzwedel, of the town of

Mecan, Wisconsin, do hereby sell, transfer, and set over to Julius Salzwedel all our personal property which we may possess at our death."

This writing was not signed by Gottlieb. In 1904 they had conveyed to Julius another farm of 157 acres, worth $6,000, located about a mile and a half from the 120-acre farm conveyed on May 13th. It appears that the parents continued to reside on the 120-acre farm. Julius resided on the 157-acre farm and worked the 120-acre farm on shares until the death of Gottlieb, a few years after the execution of the said deed and bill of sale, when Julius and his family moved to the 120-acre farm and lived thereon with Henrietta.

On September 13, 1917, Julius and Henrietta were injured in an automobile accident, and both died on that day, Henrietta surviving Julius by a few hours. At the time of her death Henrietta owned certain farm machinery, live stock, and farm produce situated on the 120-acre farm, $48 in cash, one certificate of deposit for $500 in the First National Bank at Princeton, Wisconsin, "payable to the order of self, or in case of death pay to her sons *August* or Julius;" another certificate of deposit for $400 in the same bank, "payable to the order of self or her sons *August* or Julius." Upon the reverse side of such certificate of deposit there was stamped the following: "The money herein deposited is owned jointly by the persons named and is subject to the order of either. The balance at the death of either to belong to the survivor." There were also two instruments evidencing indebtedness from Julius to Henrietta. These instruments read as follows: "April 16, 1918. Julius has one hundred dollars borrowed from mother." (This memorandum was in the handwriting of Julius, but was not signed.) "August 13, 1917. Julius has four hundred dollars borrowed from mother," signed Julius Salzwedel, *Anna Salzwedel.*

Letters of administration were issued on the estates of

Julius and Henrietta, respectively. The administratrix of the estate of Henrietta filed a claim against the estate of Julius for the indebtedness evidenced by the above memoranda. The administratrix of the estate of Julius filed a claim against the estate of Henrietta for her entire estate, praying for a judgment assigning to the estate of Julius Salzwedel, deceased, the entire estate of said Henrietta Salzwedel, deceased. The county court allowed the claim of the estate of Julius against the estate of Henrietta, in full, and disallowed the claim of the estate of Henrietta against the estate of Julius. Appeal was taken to the circuit court, where the respective claims were consolidated and tried as one matter. The circuit court rendered judgment allowing the claim of the estate of Henrietta against the estate of Julius for the amount of the indebtedness as evidenced by the memoranda above set forth and for $48 in cash, and disallowing the entire claim of Julius against the estate of Henrietta, except for the farm machinery, live stock, and personal property, which was awarded to the estate of Julius. From the judgment so entered the administratrix of the estate of Julius appeals.

For the appellant there were briefs by *D. W. McNamara* and *A. B. Hull,* both of Montello, and oral argument by *Mr. McNamara.*

For the respondent there was a brief by *Lehner & Lehner* of Oconto Falls, and oral argument by *Philip Lehner* of Princeton.

OWEN, J. The rights of the parties depend upon the effect to be accorded the so-called bill of sale executed May 13, 1913. Appellant claims that it is efficient to vest in the estate of Julius (he having predeceased Henrietta) all the right, title, and interest of Henrietta in and to all personal property of which she died seized, including money and choses in action. The trial court found that the deed and bill of sale executed May 13, 1913, "are writings which very

imperfectly attempt to evidence an agreement between Gottlieb, Henrietta, and Julius Salzwedel, by which the latter agreed in consideration of the present transfer to him of the 120 acres of land, and at the death of his parents all the personal property then on said farm, to care for his parents and in some measure to provide for them. That this agreement was in the nature of what is commonly called a 'Bread contract,' especially in what Julius promised to do by way of care and support of his parents." The contest in the circuit court seemed to involve the question of whether, by the bill of sale, it was the intention of Gottlieb and Henrietta to transfer title to money and choses in action as well as other forms of personal property. The court took evidence tending to throw light upon the intention of the parties and found that "it was the intention of Gottlieb Salzwedel, Henrietta Salzwedel, and Julius Salzwedel that the writing, 'Exhibit Z' (bill of sale), should cover the personal property on said 120-acre farm at the time of its execution, commonly known as farm property, such as stock, machinery, and farm products which should be in existence at the time of the death of the survivor of them, and all other such farm property thereafter acquired and in existence at the time of the death of the survivor of them; but that it was not intended that said 'Exhibit Z' (bill of sale) should transfer to Julius the title or ownership at any time of the aforesaid money, certificates of deposit, and other evidences of debt, or any other money that might be owned or belong to Henrietta Salzwedel at the time of her death."

Appellant strenuously contends that this finding is not supported by the evidence. Respondent combats this contention and urges further that the bill of sale does not pretend to be a transfer *in præsenti,* but purports only to vest title in Julius after the death of Gottlieb and Henrietta; that it is testamentary in character and void because not executed as a testamentary document. While we may say, in pass-

ing, that the finding of the trial court with reference to the intention of the parties is well sustained by the evidence, we hold as a matter of law that the bill of sale is inefficient to vest in the estate of Julius any right or title to the property of which Henrietta died seized. It is clear that the bill of sale does not presently convey, or intend to convey, title. It does not convey the property which the parents then owned. Title thereto remains in the parents. It only purports to vest title in Julius upon the death of the parents. Its purpose was therefore purely testamentary, and, not being executed in the manner required for the execution of wills, it must fail as a testamentary document. *Schultz v. Becker,* 131 Wis. 235, 110 N. W. 214. It is perfectly clear, too, that the transaction did not amount to a gift, because there was no delivery of the property, which is an essential element of a gift either *inter vivos* or *causa mortis.* It follows that the claim of the estate of Julius against the estate of Henrietta is entirely baseless and was properly disallowed by the circuit court.

So far as the claim of the estate of Henrietta against the estate of Julius is concerned, there is no contention that the memorandum, mentioned in the statement of facts, upon which the claim is founded, does not represent an indebtedness from Julius to Henrietta, but it is claimed that it passed to Julius by virtue of the bill of sale, which, as we have seen, was of no effect. The claim in favor of the estate of Henrietta against the estate of Julius, therefore, was properly allowed.

It is suggested in appellant's brief that even if the bill of sale is void, nevertheless the court found that there was a sufficient consideration therefor, by virtue of the agreement on the part of Julius to support the parents so long as they lived, to constitute a basis for the claim filed against the estate of Henrietta, under authority of such cases as *Ellis v. Cary,* 74 Wis. 176, 42 N. W. 252; *Martin v. Estate of Martin,* 108 Wis. 284, 84 N. W. 439; and *Loper v.*

Estate of Sheldon, 120 Wis. 26, 97 N. W. 524. The principle of those cases is that a person rendering services for another, which would otherwise be gratuitous, may recover therefor on *quantum meruit* on proof that they were rendered pursuant to an express promise or agreement by the one receiving the services to compensate therefor, even though such promise or agreement was void under the statute of frauds. Those cases do not hold that the void contract can be resorted to for the purpose of measuring the amount of the recovery, but that it may be invoked for the purpose of rebutting the presumption that the services were gratuitously rendered. The recovery must be on *quantum meruit.* In this case no claim was presented upon such a theory and no proof was offered concerning the reasonable value of the services rendered, consequently the principle of those cases has no application.

By the judgment of the circuit court it was adjudged "that the certificates of deposit for the sum of $400 and $500, respectively, belong to *August Salzwedel,* and are hereby ordered to be delivered to him." Appellant contends that this was error; that the certificates of deposit belonged to Henrietta at the time of her death and that there had never been any delivery thereof so as to vest *August* with title thereto prior to the death of Henrietta, and refers to the case of *Dupont v. Jonet,* 165 Wis. 554, 560, 162 N. W. 664. It must be admitted that there is grave doubt concerning the correctness of this disposition of the certificates of deposit. But that question is not presented by this appeal. The only question presented by the appeal of the administratrix of the estate of Julius is whether the court erred in holding that the estate of Julius had no title to these certificates. The appeal does not present the question of whether the certificates belong to *August.* The party adversely affected by that decision is the administratrix of the estate of Henrietta, and she has not appealed. The question, therefore, is not before us for review.

The view we take of the effect of the bill of sale makes it unnecessary to consider errors assigned upon the admission and rejection of testimony.

By the Court.—Judgment affirmed.

GOLDBERG and wife, Respondents, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

April 8—May 4, 1920.

Witnesses: Examination: Refreshing memory of witness by handing him his signed statement: Disclosure of contents of statement by witness: Effect: Voluntary statement of witness as ground for new trial.

In an action against a railroad company for the loss of support occasioned the plaintiffs by the killing of their son, the inquiry as to whether a train came to a stop at a certain crossing being material, and the engineer, called adversely by the plaintiffs, having testified that he did not stop his train at the crossing, it was proper for defendant's counsel, for the purpose of refreshing the memory of the witness, to exhibit to him his signed statement made shortly after the accident; and the volunteered remark of the engineer, that the statement said he stopped, not being attributable to defendant's conduct of the examination, the court erred in awarding a new trial to plaintiffs solely on the ground of the remark of the witness.

APPEAL from an order of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Reversed.*

This action was brought by *Isaac* and *Tobia Goldberg* to recover for the loss of support occasioned by the death of their son, Abraham Goldberg, an unmarried man twenty-six or twenty-eight years of age, living with them in the city of Marinette. He was run over and killed by one of defendant's switching trains in the vicinity of the Division-street crossing in the city of Marinette. No one saw the deceased when he was struck by the train. The accident occurred about 3:30 p. m. on February 16, 1917. He was

last observed walking south upon the west side of Division street, north of the crossing, and had not then reached the track of the St. Paul road, which is fifty-two feet from the Chicago & Northwestern tracks. A train consisting of an engine and twelve loaded freight cars, the cars being ahead of the engine, was being pushed westwardly from one switch to the other within the switching yards. The train passed over Division-street crossing, and, after it had passed, a man named Nelson found the body of the deceased at the Excelsior switch, 500 feet west of the Division-street crossing. Two sectionmen were called by Nelson to the place where the body was found, and as they ran to the Excelsior switch they observed the marks in the snow of the dragging of the body. Afterwards, it is claimed, they with others walked to the crossing and found that the first marks of the dragging body began at a point between fifty and one hundred feet west of the crossing, but observed no marks or other evidence of the accident from that point to the crossing.

Two causes of action were alleged by the plaintiffs: the first alleging in substance negligence on the part of the defendant, the second gross negligence. The second cause of action was withdrawn at the conclusion of the plaintiffs' evidence. The action was tried as a crossing-case accident pursuant to sec. 1809, Stats., governing the operating of trains over public grade crossings. A motion for nonsuit at the conclusion of plaintiffs' testimony was denied.

The issues were submitted to the jury by a special verdict, the first question of which was: "Was Abraham Goldberg killed by being struck by defendant's train on the Division-street crossing on February 16, 1917?" The jury returned an answer "No" to this question, and were instructed by the court that they should not give consideration to the other questions of the verdict in the event of the first question being answered in the negative. The defendant moved for judgment in its favor upon the verdict and the uncontra-

dicted evidence. The plaintiffs moved the court to set aside the verdict and grant a new trial upon the grounds of (1) erroneous admission of evidence; (2) erroneous exclusion of evidence; (3) error in instructions.

Defendant's motion was denied and plaintiffs' motion granted and a new trial ordered upon the ground of the improper admission of the evidence of the witness Joseph Williams. Defendant appeals from the order granting a new trial.

R. N. Van Doren of Milwaukee, for the appellant.

For the respondents there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

SIEBECKER, J. The plaintiffs alleged and claimed at the trial that the decedent was killed upon the Division-street crossing; the defendant claimed that the evidence showed that he was killed at a place on the track from fifty to ninety feet west of this crossing. The jury found that he was not killed at the crossing. This issue of fact is all-important in determining the rights and liabilities of the parties. The inquiry of fact whether or not the train came to a dead stop while passing over the crossing was a material inquiry by the jury in answering question No. 1 of the special verdict. The trial court held that in the light of the statement of defendant's counsel in opening the case to the jury that the defense would prove that the train came to a dead stop and while so stopping decedent manifestly attempted to go between the cars and was thus caught and killed, under the circumstances detailed hereafter, it was prejudicial error for the engineer, Williams, to state to the jury that he, in a signed and written statement on the day after the accident, had stated that the train came to a stop, although in immediate connection with this statement while on the witness stand he testified that such statement was incorrect and that the train in fact did not come to a dead

stop in passing over the crossing. Williams was called by plaintiffs for cross-examination at the trial under sec. 4068, Stats., and testified in answer to inquiries propounded by plaintiffs' counsel that he positively recollected that his train did not stop in passing over the Division-street crossing. Before leaving the witness stand defendant's counsel asked him if he might be mistaken in so testifying, to which the witness replied: "Did not come to a dead stop." Defendant's counsel then propounded the following questions, which were answered as follows:

"*Q.* Did you make a statement shortly after the accident, Mr. Williams? *A.* Yes, sir. *Q.* I want to show you this Exhibit 5, Mr. Williams, and ask you if that is your signature there? *A.* Yes, sir. *Q.* Will you just look at that, please, and refresh your recollection from that, and see whether you are mistaken or not? *A.* I might be; I am pretty sure it didn't come to a full stop. *Q.* Well, read that and let us know whether that refreshes your recollection, Exhibit 5? *A.* It says here I did. *Q.* Now, does that refresh your recollection on the matter, or doesn't it? *A.* I can't remember or recollect it."

The witness then testified that the statement appeared to have been signed February 17th; that he thought that this was the next day after the accident; that the facts were then fresh in his mind. After having thus read the statement then and there he declared to the jury: "I am positively sure that I did *not* come to a full stop." Objection to all this testimony was entered and a motion made to strike it out as self-serving statements. This motion was denied.

The trial court says that the statement was not offered by the defendant "nor was the examination had for the purpose of impeaching the witness, *but merely for the purpose of refreshing his recollection,*" and that defendant's counsel did not refer to this statement in his argument to the jury. This proceeding shows defendant's counsel exhibited to the witness the written statement for the purpose of having him refresh his recollection, and that the above-quoted

answer, *"It says here I did,"* was not responsive to the question asked him. The witness volunteered the statement. No request was made by plaintiffs' counsel specifically calling attention to it and to have it stricken; his motion was to strike all this testimony as self-serving statements. We are persuaded that it was proper for defendant's counsel to call the witness' attention to this signed statement in the manner he did for the purpose of refreshing his recollection, and that the witness' disclosure of this much of the writing is not attributable to defendant's conduct of the examination. The question recurs, Did the court commit prejudicial error in granting a new trial upon the ground that such statement operated to the plaintiffs' prejudice? We cannot discover any prejudicial effect of this mere voluntary statement by the witness when considered in the light of his repeated statements to the jury in connection therewith that he was positive the train did not stop while passing over the crossing. It is obvious that this bit of testimony was not singled out by the jury for reliance to answer the first question in the negative. The positive denials by Mr. Williams regarding it and the other evidentiary facts in the case clearly refute such a conclusion. It is manifest that the court erred in awarding a new trial solely on the ground of this statement of Williams. It is considered that the order awarding a new trial must be reversed.

By the Court.—The order appealed from is reversed, and the cause remanded to award judgment in accordance with the verdict.

ESTATE OF STEPHENSON.

April 9—May 4, 1920.

Taxation: Inheritance tax: Nature: Time of transfer of estate and accrual of tax: Division of estate into terms and remainders: Effect on tax: Defeat of contingent remainder: Adjustment of tax: Gifts in contemplation of death: Equitable conversion: How effected: Shares in trust estate as personalty.

1. The inheritance tax act (secs. 1087—1 *et seq.*, Stats.) imposes a tax on the right to transfer the estate of a decedent to another person, and not upon the estate itself, which is only the measure of the tax.
2. The act imposes a tax on the transfer as of the time of the death of the transferor, at which time the tax accrues and the transfer takes place, so that the value of testator's property passing under a trust declared prior to his death was properly added to the value of the property passing under the will, and the tax assessed on the sum of both instead of on each transfer separately at the rate in effect at the time of his death.
3. Under the act the state is entitled to a tax measured by the clear market value of the property transferred, and the value of the estate for taxing purposes cannot be diminished by dividing it into term estates and remainders; and if a contingent remainder is defeated and the estate passes to another remainderman, an adjustment pursuant to sub. 6 and 8, sec. 1087—15, will be made.
4. Whether a gift is such a material part of a testator's estate as to be deemed to have been made in contemplation of death and therefore subject to the inheritance tax imposed by secs. 1087—1 *et seq.*, is in each case a judicial question.
5. In the proceedings to assess against decedent's estate the inheritance tax provided by secs. 1087—1 *et seq.*, the facts and circumstances are *held* to justify the finding of the county court that a gift to testator's daughter of $23,000 was made in contemplation of death and was therefore taxable.
6. The conversion of realty into personalty may be effected by an agreement, as a trust agreement, as well as by will or otherwise; and there need be no specific direction to sell the land to convert it into personalty, but the direction may arise by necessary implication from the nature of the instrument.
7. In view of the trust agreement—providing, among other things, that real estate may be sold though a sale is not compelled; that the personal property and the real estate constitute but one fund; that ownership in certificates passes by assignment; that it gives no title in the trust property; that it does not

descend to the heirs but goes to the administrator or executor; and that the trust does not constitute a partnership,—shares or certificates owned by the testator in a trust created by stockholders of his lumber company in another state where it owned lands are *held* personalty for the purpose of subjecting them to an inheritance tax under secs. 1087—1 *et seq.*

APPEALS from an order of the county court of Marinette county: ALVIN E. DAVIS, Judge. *Affirmed.*

May 15, 1916, Isaac Stephenson gave his daughter *Mrs. Morgan* $23,000. For six year previous to March 15, 1918, he had made additional gifts to his wife, children, grandchildren, and others aggregating nearly $200,000, ranging in amount from $7,300 to a few hundred dollars, over $26,000 of which he gave to *Mrs. Morgan* in addition to the $23,000 gift.

May 12, 1917, he executed and delivered a trust deed of a portion of his property, amounting to $4,432,566.28, to certain trustees for the benefit of himself, his wife, children, and grandchildren. The trust provided for trust terms and contingent remainders to some of the *cestuis que trustent.* March 15, 1918, he died testate leaving an estate of $2,791,675.37. A portion of the estate passing under the trust deed of May 12, 1917, consisted of certificates representing 27,836½ parts in the Isaac Stephenson Company Trustees, a trust holding lands and personal property in the state of Michigan, which parts were of the value of $1,394,325. The widow elected to take under the statute and not under the will.

The county court, for the purpose of computing the inheritance tax as to each beneficiary, added the value of the property passing under the trust deed of May 12, 1917, including the value of the certificates in the Isaac Stephenson Company Trustees, to the value of the property passing under the will, and assessed each beneficiary the tax in force at the time of the death of the testator, allowing but one exemption to each beneficiary. As to *Mrs. Morgan* the court also included in her share the gift of $23,000. From

an order so determining the inheritance taxes three appeals were taken by some of the beneficiaries.

For the appellant executors and trustees and certain beneficiaries under the will there was a brief signed by *Upham, Black, Russell & Richardson* of Milwaukee, attorneys, and *Harry R. Goldman* of Marinette, guardian *ad litem* for *Isaac Stephenson George, Isaac Watson Stephenson, Jr.,* and *Mary Elizabeth Stephenson,* and a reply brief by *Upham, Black, Russell & Richardson;* and the cause was argued orally by *William E. Black* and *C. C. Richardson.*

For the appellants *Martha E. Stephenson* and *Grant T. Stephenson* there were briefs by *Fawsett & Smart* of Milwaukee, and oral argument by *Charles F. Fawsett.*

For the State there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *John Harrington,* inheritance tax counsel, and a separate brief by *Mr. Harrington;* and the cause was argued orally by *Mr. Brossard* and *Mr. Harrington.*

VINJE, J. The three appeals were briefed and argued together and the assignments of errors covering all are: The court erred (1) in computing the tax on the transfers under the trust deed at the rate in effect at the time of the death of the testator instead of at the rate in effect at the time of the execution of the trust deed; (2) in adding the amount received under the will to the amount received under the trust deed and assessing the tax on the sum instead of on each transfer separately at the rate in effect at the time thereof; (3) in the method of assessing the contingent remainders; (4) in including the gift of $23,000 to *Mrs. Morgan* as taxable; and (5) in assessing a tax on the value of the certificates in the Isaac Stephenson Company Trustees.

The first two assignments of error are so closely related that it is deemed best to treat them together. Answers to the questions, When does the tax accrue? or When does the

transfer for tax purposes take place? will largely determine whether the court erred as to either. If the tax accrues and the transfer for tax purposes occurs as of the time of the death of the testator, then the court adopted the correct rate, and was also right in adding the value of the two transfers together and taxing them as one sum. But if the tax accrues and is due and payable when the actual transfer takes place, irrespective of the death of the testator or intestate, then the court erred in assessing the tax on the value of the property under the trust deed at the rate in effect when Stephenson died, for ch. 320, Laws 1917, which took effect June 2, 1917, increased the rates in force when the trust was created on May 12, 1917, and it also erred in adding together the value of the two transfers and taxing them as one.

Stephenson was a resident of this state, hence for the purposes of this case reference need be made to only these provisions of our inheritance tax act. It provides for a tax (a) when the transfer is by a will or by the intestate laws of this state, and (b) when a transfer by gift, deed, or otherwise is made in contemplation of the death of the donor or grantor. Sub. (1), (3), sec. 1087—1, Stats. 1919. Sub. (4) of said section provides that "Such tax shall be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer whether made before or after the passage of this act." Sub. 1, sec. 1087—5, provides that "All taxes imposed by this act shall be due and payable at the time of the transfer, except as hereinafter provided." Sec. 1087—2 reads: "When the property or any beneficial interest therein passes by any such transfer, . . . the tax hereby imposed shall be: . . ." These provisions of the statute standing alone certainly give color to the argument that when a transfer occurs the tax becomes due and payable irrespective of the time of the death of the transferor.

But language quite plain and persuasive when viewed merely in the light of its immediate context must yield in meaning to the general scope and purpose of the act of which it forms a part, if such scope and purpose is plain and unambiguous, and if the language used is susceptible of a meaning consonant with such general scope and purpose. The inheritance tax act was passed for the purpose of imposing a tax upon the transfer of the estate of a decedent to another. The tax, of course, is upon the right to the transfer, not upon the estate. *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627; *State v. Pabst,* 139 Wis. 561, 121 N. W. 351; *Estate of Week,* 169 Wis. 316, 318, 172 N. W. 732. The latter is only the measure of the tax. The tax is a graduated one both as to amount of estate transferred and as to the relationship of the receiver to the deceased. The statute contemplates but one estate for each decedent, else there would be but little object in graduating the tax according to amount, for the estate could easily be split up into a number of gifts, trusts, or wills and intestate property, and thus the graduated feature of the statute could be entirely defeated. The law provides for transfer by will, by intestate law, and by gift in contemplation of death. These all connote testamentary or intestate disposition of an estate. Gifts made in contemplation of death for taxing purposes under the statute become a part of the estate of the decedent. A deceased person can leave but one estate. All property owned by him at the time of his death is a part of his estate, and gifts previously made in contemplation of death for taxing purposes merge in the estate. Such is the obvious scope and purpose of the law, such has been the administration under it, and such has been the construction given it by this court. *State v. Pabst,* 139 Wis. 561, 121 N. W. 351; *Estate of Bullen,* 143 Wis. 512, 128 N. W. 109; *State v. Thompson,* 154 Wis. 320, 142 N. W. 647; *Estate of Ebeling,* 169 Wis. 432, 172 N. W. 734; *Estate of Week,*

169 Wis. 316, 172 N. W. 732. In the *Pabst Case* it is said: "The provisions of ch. 44, Laws 1903, in words are expressive of the intent that the tax shall be imposed at the time of the death of the transferor, in the manner and under the conditions prescribed, upon the interests transferred by him." Page 584. "The context of the law expresses as its purpose and object that the tax shall be imposed on the transfer at the time of the death of the decedent and rest as a lien on the property so transferred until paid." Page 585. And in the same case, speaking of the provisions of sub. 1, sec. 1087—5, the court says: "This portion of the law does not operate to postpone the imposition of the tax on the transfer beyond the time of the death of the transferor, for, as we have seen, *the tax comes into existence at the time of the death of the decedent.*" Page 585. And again, "the tax is imposed at the time of the devolution of the property, which is at the time of the transferor's death." Pages 586, 587. Language could not very well be more clear and explicit to the effect that for taxing purposes the tax accrues and the transfer takes place as of the time of the death of the transferor. In *Estate of Bullen,* 143 Wis. 512, 128 N. W. 109, transfer of property made in contemplation of death was treated as part of the estate. So, also, in *State v. Thompson,* 154 Wis. 320, 142 N. W. 647; in *Estate of Ebeling,* 169 Wis. 432, 172 N. W. 734; and in *Estate of Week,* 169 Wis. 316, 172 N. W. 732. In the latter case it is said: "The transfer contemplated occurs at the instant of death." Page 318.

Sub. 1, sec. 1087—5, makes every administrator and executor equally liable with a trustee or person to whom transfer of property has been made in contemplation of death, for the whole tax, including that on the portion of the estate transferred in contemplation of death as well as that transferred by will or under intestate laws. If each was to be taxed separately and at the actual time of transfer,

it would be unjust to hold an executor or administrator liable for a tax on property that is no part of the estate he is administering.

In view of the evident purpose of the inheritance tax act; in view of the unbroken administration of it since 1903; in view of the consistent and repeated constructions given it by this court; and in view of the fact that the construction contended for by appellants would frustrate the obvious intent of the legislature to tax estates as a unit, and would in a very material manner render necessary a reconstruction of our taxing scheme, this court cannot follow courts that have reached a different conclusion upon somewhat similar statutes. The case *In Matter of Hodges,* 215 N. Y. 447, 109 N. E. 559, decided in 1915, is especially relied upon by appellants and is squarely in point. There a different conclusion is reached. That case, however, was decided after the *Pabst Case,* which was decided in 1909, and cannot, therefore, have the weight that it might have were the question an open one in this state. Our conclusion is the county court properly added the value of the property passing under the trust to the value of the property passing under the will and applied the correct rate to the sum thereof.

The trust of May 12, 1917, was created by Stephenson for the period of the life of himself and wife and twenty-one years thereafter. A number of estates for the trust term were created, with a remainder in fee to the beneficiary of such estate. The county court assessed the estate of each such beneficiary the full present value thereof as though it passed immediately to him in fee. It is claimed that this was error and that it should have valued the term estate and the remainder estate separately and taxed each separately; that since it was uncertain whether the beneficiary would survive the trust term, he took a contingent remainder liable to be defeated by his prior death. For taxing purposes the value of an estate cannot be diminished by dividing it into term estates and remainders. The state

is entitled to an inheritance tax measured by the clear market value of the property transferred. Sub. (8), sec. 1087—1. Where the term tenant and the remainderman are the same, as in this case, there is no necessity of separately valuing the term estate and the remainder, since the value of one added to the value of the other always equals the value of the whole estate. Sub. 6, sec. 1087—15, provides that "In estimating the value of any estate or interest in property to the beneficial enjoyment or possession whereof there are persons . . . presently entitled thereto, no allowance shall be made in respect of . . . any contingency upon the happening of which the estate or property or some part thereof, or interest therein, might be abridged, defeated or diminished." And the term estate and the contingent remainder are alike both presently taxable. Sub. 8, sec. 1087—15.

If the contingent remainder is defeated and it passes to another remainderman, an adjustment pursuant to secs. 1087—15 and 1087—8 will be made.

The expression "lowest rate" used in sub. 8, sec. 1087—15, refers to the lowest rate based upon the relationship of the beneficiary to the transferor and not to the lowest basic rate based upon the value of the estate transferred. For this reason, and for reasons stated in discussing the first and second assignments of error, the court properly refused to tax the term and remainder estates separately where the same person was the beneficiary of both.

Did the county court err in taxing the gift of $23,000 made to *Mrs. Morgan?* It is urged that this gift to the daughter is only a trifle larger per cent. of the value of Stephenson's estate than the gift of $1,000 was of the value of the Ebeling estate (169 Wis. 432, 172 N. W. 734), which this court held exempt because not deemed to have been made in contemplation of death; and that it did not constitute a material part of the testator's estate within the meaning of sub. (3), sec. 1087—1, which provides, "Every

transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section," and was therefore not taxable. As was stated in the *Ebeling Case,* whether a gift is so material as to be deemed to have been made in contemplation of death is in each case a judicial question. And while it must be admitted that the ratio the gift bears to the whole estate is a very important factor, it is not *per se* the determining factor in each case. The size of the gift itself, irrespective of the size of the estate, has a direct bearing upon the answer. It was the legislative intent that a gift of a material part of an estate made within six years of the donor's death should not escape taxation. Now a large sum of money is a material part of any estate no matter how large, because it is a matter of substance—a matter that is not immaterial. The gift to *Mrs. Morgan* no doubt equals that of the average estate probated in this state. Add to that the fact that within the period of six years prior to his death Stephenson had given her over $26,000 in other gifts held not taxable, and to other persons about $150,000 more in gifts not taxed, and it cannot be said the court was guilty of an abuse of discretion in finding the gift of $23,000, which was wholly unexplained, to be a material part of testator's estate and therefore taxable. Each case must be viewed in the light of its own facts and circumstances in determining whether or not a gift is taxable. So viewing this case, we conclude the court not only did not abuse its discretion in finding the fact as it did, but that it reached the right result.

The Isaac Stephenson Company Trustees was a trust created in 1912 by the stockholders of the I. Stephenson Company, a Michigan corporation, which had a capital stock of $800,000 divided into 80,000 shares of the par

value of $10 each. In the trust the stockholders were called certificate holders, and held certificates of parts in number and par value equal to the number and par value of their shares of stock. In the trust each share was called a part. Five trustees were created, and they were required to carry on the lumber operations and general business of the former corporation during the lives of two of the certificate holders or the survivor of them, unless sooner terminated by a two-thirds vote of the certificate holders, each part being entitled to one vote. The certificate holders also had the right to remove and appoint trustees as well as terminate the trust at any time. When terminated, the trust property, which at the time of Stephenson's death consisted of real estate and personal property, but chiefly real estate, should vest in the I. Stephenson Lumber Company, a Wisconsin corporation. The trust agreement contained these provisions:

"The beneficial interest of each certificate holder in said trust estate or parts of such interest may be passed by an assignment and transfer of his or her certificate or parts thereof, but any such beneficial interest shall not vest in the assignee until there has been a transfer of the old certificate upon the books of the trustees and a new certificate or certificates issued in place thereof."

"The beneficial ownership of parts of said trust estate hereunder shall not entitle the certificate holder to any title in or to the trust property whatsoever, or any right to call for a partition or division of the same or for an accounting."

"It is hereby expressly declared and understood that no partnership or partnership relations or liabilities shall be created or established by or between the parties to this agreement or any of them, their successors, legal representatives, heirs, or assigns, by virtue of this agreement, and that this agreement shall not be construed as creating or establishing any partnership or partnership relations or liabilities by or between any such parties."

"The death of a certificate holder during the continuance of the trust shall not operate to determine the trust, nor shall it entitle the legal representative of the deceased certificate holder to an accounting or to take any action in the

courts or elsewhere against the trustees; but the executors, administrators, or assigns of any deceased certificate holder shall succeed to the rights of said decedent under this trust upon the surrender of his certificate for the parts of said trust estate of which he had the beneficial ownership and the issuing in lieu thereof of a new certificate to the person entitled thereto."

So far as we have discovered, the trust agreement contains no provisions that in any way militate against or modify the effect of the above quoted provisions. Stephenson at the time of his death owned 27,836½ parts of the 80,000 parts of the trust, and the question arises whether such ownership was of personal property or of real estate. It is claimed on the part of the appellants that the certificates represented the ownership of an interest in real estate situated in Michigan and therefore did not constitute a taxable estate in Wisconsin. The state claims the certificates represent beneficial ownership in personal property and are therefore taxable because their situs is that of the residence of the deceased. Upon digesting the trust provisions it will be found that authority to sell real estate is given though a sale is not compelled; that the personal property and the real estate constitute but one fund; that ownership in certificates passes by assignment; that it gives no title in the trust property; that it does not descend to the heirs but goes to the administrator or executor; and that the trust does not constitute a partnership. It would be difficult to designate indicia of personal property more effectively than is done here. A declaration that the trust property shall be regarded as personal property could do no more. Indeed, that might be a misnomer if the trust contained specific provisions negativing it, for it is the substance of an agreement and not the name given it that controls. It is a fundamental rule that an equitable conversion may be effected by an agreement as well as by will or otherwise, and that there need be no specific directions to sell land to convert it into

personalty. Such direction may arise by necessary implication from the nature of the instrument or from the language used. 6 Ruling Case Law, 1065. Neither is there necessity for a direction to the trustees to convert land into personalty where, as here, the creators of the trust have done so. They have by the provisions above referred to indelibly stamped the trust property as personalty by giving it all the qualities thereof for purposes essential to or convenient for the prosecution of the business of the trust. Having made the property personalty for their own uses, it will be so considered for taxing purposes.

It may be argued that none of the above provisions taken singly are sufficient to constitute a conversion. Thus it is said that a tax certificate which constitutes an interest in land (*Eaton v. Manitowoc Co.* 44 Wis. 489) passes by an assignment. This is true, but it does not pass to the administrator or executor but to the heirs, as land does. *Madler v. Kersten,* 170 Wis. 424, 175 N. W. 779. If there be a weakness or ambiguity in any single provision there can be no reasonable doubt left when all are considered together, as they should be. The cases of *Dana v. Treasurer,* 227 Mass. 562, 116 N. E. 941, and *Priestly v. Treasurer,* 230 Mass. 452, 120 N. E. 100, sustain the conclusion here reached under facts quite similar, while the case of *Bartlett v. Gill,* 221 Fed. 476, reaches a different conclusion. Undoubtedly the trust certificates represent an interest in real estate, just as do mortgages, and shares of a corporation owning realty, but they must be regarded as intangible property for taxing purposes just as the latter are, because the creators of the trust have made them intangible or personal property in unmistakable terms.

By the Court.—Order affirmed.

MERRILL, Respondent, vs. CHICAGO, NORTH SHORE & MILWAUKEE RAILROAD, Appellant.

April 9—May 4, 1920.

Street railways: Track crossing public street: Ordinance governing speed of interurban cars upon streets: Application: Collision with automobile: Contributory negligence.

1. The track of an interurban electric railroad crossing a city street is maintained "upon" such street within the meaning of a city ordinance to the effect that no motorman in charge of an interurban car propelled by electricity shall operate any such car "upon or along any railroad track laid and maintained on any public street" at a greater rate of speed than fifteen miles per hour.
2. In an action against an interurban electric railroad for damages sustained when one of its cars collided with an automobile at a place where the tracks crossed a city street, the question of whether the driver was guilty of contributory negligence is for the jury.

APPEAL from a judgment of the circuit court for Kenosha county: E. T. FAIRCHILD, Judge. *Affirmed.*

Personal injury. December 23, 1917, the wife of the plaintiff, aged thirty-nine years, was riding in a Ford automobile driven by her son, Leland Merrill, at that time seventeen years of age. They were going from plaintiff's farm to Kenosha, and in so doing passed over the double tracks of the defendant company, which run north and south, the crossing being made on Avery street, which runs east and west. West of the company's tracks, and parallel thereto, is Superior street. From the intersection of Superior and Avery streets to the track is 214 feet. On the south side of Avery street and between Superior street and the tracks there are buildings which partially obstruct the view of a traveler upon Avery street approaching the tracks from the west, although a traveler so approaching the tracks is able to see portions thereof. The morning in question was misty, the driver of the car knew he was approaching the tracks of the defendant, and at the east side of Superior

street looked south to ascertain whether a car was approaching from that direction. At that point he was able to see about 100 feet of the tracks of the defendant at a point about 500 feet south of the Avery-street crossing. As he passed to the east his view was obstructed by the freight depot and a building described as the Italian Bakery, located on the rear of a lot fronting on Superior street. As he approached the tracks he looked to the north to see if there was an approaching car on the west or south-bound track. West of the south-bound track there was a sidetrack, on which at the time were standing two freight cars. The cars were near the south line of Avery street. As he came opposite the freight cars he reached over the steering wheel and looked as far to the south as he could, and listened to ascertain whether or not any car was approaching on the east or north-bound track from the south. The distance between the north- and the south-bound tracks is thirteen feet. He reduced his speed slightly, and when within about twelve feet of the east-bound track he discovered a car approaching him, and the driver remembers nothing further until he regained consciousness in the hospital.

The street car struck the automobile and carried it north of the crossing a distance of 219 feet. The driver was thrown a distance of seventy-seven feet north of the center of Avery street. Maude Merrill, the wife of the plaintiff, was instantly killed, and this action is brought to recover damages caused by her death and for injury to the automobile.

The issues were submitted to the jury on a special verdict. The jury found (1) that in approaching the Avery-street crossing the whistle was not blown; (2) that the failure to blow the whistle was a proximate cause of the accident; (3) that the street car was traveling at a speed of more than fifteen miles per hour as it approached the crossing; (4) that such speed was a proximate cause of the accident; (5) that the motorman failed to exercise ordinary care in operating

the car just prior to the collision; (6) that such failure to exercise ordinary care was a proximate cause of the collision; (7) that the driver was not guilty of any want of ordinary care which contributed to the injury; (8) assessed plaintiff's damages at $7,291.88.

There were the usual motions. Defendant's motions were denied, and the plaintiff had judgment for the amount of the verdict, from which judgment the defendant appeals.

For the appellant there was a brief by *Fisher & Fisher* of Kenosha, attorneys, and *John B. Simmons* of Racine, of counsel, and oral argument by *Mr. G. T. Hellmuth* of Chicago and *Mr. Simmons.*

Robert V. Baker and *Frank S. Symmonds,* both of Kenosha, for the respondent.

ROSENBERRY, J. It will be noted that question 3 of the special verdict inquired whether or not the street car was traveling at a greater rate of speed than fifteen miles per hour as it approached Avery street. This question was framed with reference to an ordinance of the city of Kenosha, the material provisions of which are as follows:

"No motorman . . . in charge of an interurban car . . . propelled by electricity, shall run, drive, propel, or operate any such car upon or along any railroad track laid and maintained on any public street . . . at a greater rate of speed than fifteen miles per hour."

The court correctly construed this ordinance as applying to Avery street, although the tracks of the defendant ran across Avery street and not within and parallel with it. *People's R. T. Co. v. Dash,* 57 Hun, 587, affirmed 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728. There is abundant evidence to sustain the answer of the jury to the third question. The negligence of the defendant company, therefore, must be regarded as fully established.

The serious question in the case is whether or not the driver of the automobile in which the deceased was riding

was guilty of a want of ordinary care at the time and place of the accident.

The driver of the automobile was in the possession of all his faculties and had good hearing and eye-sight. The car in which he was driving could be easily stopped. The street was even with the tracks of the company and had a width of fifty feet. The day was warm and, although there was a slight mist, objects could be readily seen. It was eighteen feet from the west rail of the west track to the east rail of the switch track upon which the two freight cars were standing. The driver testified as follows:

"I looked to see if a car was coming. The windshield was down and I reached up, looking over. I was then right opposite the switch track, going about eight miles an hour. After leaving the switch track I looked north, first to see if I could see a car coming. Then I did look south, but the car was right on me. When I was opposite the switch track I looked south. I don't know how far I could see. Not as far as Salem avenue" (the next street to the south parallel with Avery street).

On behalf of the defendant it is argued strenuously and with much force that had the driver looked at the proper places he must have seen the approaching car. We are not dealing with a situation in this case where the driver did not look and listen, but with a case where he did look and listen but failed to detect the approach of the car by reason of obstructions to his view. There is evidence from which the jury might have found that the car was approaching the crossing at a very high rate of speed. We cannot set out in detail all of the facts bearing upon the question of contributory negligence. While the case is not free from difficulty, we have, after a careful examination of the record, concluded that upon all the facts a jury question was presented. No doubt the evidence would have sustained a verdict finding the driver guilty of contributory negligence. We recognize the established rule covering the

conduct of persons approaching a railroad crossing. We think this case is ruled by the principles laid down in *Dahinden v. Milwaukee E. R. & L. Co.* 169 Wis. 1, 171 N. W. 699, rather than by *White v. C. & N. W. R. Co.* 102 Wis. 489, 78 N. W. 585.

By the Court.—Judgment affirmed.

POPE, Respondent, vs. THOMPSON, Appellant.

April 10—May 4, 1920.

Partnership: Action at law for share in profits: Necessity of final accounting: Agreement to form a partnership: Breach: Evidence: Contracts: Mutuality of obligation essential.

1. One partner cannot maintain an action at law for a share of the profits against his copartner in the absence of a final accounting or settlement of the partnership affairs.
2. Evidence showing negotiations between the parties for the joint undertaking of certain contracts, in which no definite terms of partnership were stated, is *held* not to warrant the jury in finding an agreement to form a partnership, for breach of which plaintiff was entitled to a share of the profits made by defendant on the resale of a contract let to him.
3. Where there is no consideration for a contract except the mutual promises of parties, the contract is not binding on one party unless it is also binding on the other.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

Partnership. The complaint alleges that the plaintiff is a steam-shovel operator; that the defendant is a sewer contractor; and that on or about the 6th day of August, 1919, the plaintiff and defendant "entered into an agreement to share equally in the profits for the digging and constructing of certain sewers in the city of Kenosha;" that pursuant to said agreement the plaintiff went with defendant over the ground where the sewers were to be constructed, examined the plans, and performed other services in connection with said agreement; that on August 8, 1919,

the contract for the construction of said sewers was authorized by the officers of the city of Kenosha, confirmed by the common council on August 11, 1919. The contract price for work to be done was $25,000; and "it was expressly agreed by and between the plaintiff and defendant that each were to share equally in the profits of said work, whether the work was actually performed by them, or sold to some other sewer contractor;" that on August 16th the defendant sold the contract for the sum of $2,800; and demanded judgment against the defendant for $1,400.

The defendant in his answer denied that the plaintiff and defendant entered into an agreement to share the profits of constructing the sewers referred to; "that on or about said time the said plaintiff and defendant had conversations respecting such work, but such conversations or acts or conduct on the part of the plaintiff did not result in the making of any agreement;" and alleged that the defendant refused to enter into any agreement, and the contract of the city of Kenosha was awarded to the defendant personally.

There was a trial. The jury, by general verdict, found in favor of the plaintiff and assessed his damages in the sum of $1,400. Plaintiff had judgment accordingly, from which the defendant appeals.

Robert V. Baker of Kenosha, for the appellant.

For the respondent the cause was submitted on the brief of *Calvin Stewart* of Kenosha.

ROSENBERRY, J. We are not enlightened as to the theory upon which the plaintiff proceeded in this action. Plaintiff carefully refrains from alleging that the plaintiff and defendant were partners. The allegation is "that each was to share equally in the profits." Manifestly, if there was a partnership, in the absence of an accounting or settlement of the partnership affairs the plaintiff could not maintain this action at law against his copartner. No such accounting or settlement is alleged or proven. The only other

theory upon which the plaintiff can sustain his contentions in this case is that there was a contract for a partnership, and that by reason of the defendant's breach of this contract for a partnership the plaintiff has suffered damages, which he is entitled to recover. *Hill v. Palmer,* 56 Wis. 123, 14 N. W. 20.

The court instructed the jury:

"To entitle him to a favorable verdict the plaintiff must satisfy the jury by the preponderance or greater convincing force of the credible evidence that the agreement he claims was made between him and the defendant. A contract or agreement implies a meeting of the minds of the parties; that is, that they understand the proposition involved alike, the one consenting or agreeing to exactly the same thing the other does."

The jury found that there was a contract, and the vital question in the case is whether or not there is evidence sufficient to sustain the finding of the jury. The evidence is practically uncontradicted, and where contradicted we take as true that in favor of the plaintiff.

It appears that plaintiff was an experienced engineer or shovelman. The defendant went to the house of the plaintiff and requested the plaintiff to inspect a shovel which the defendant was using at the time. This was some time in the month of July. During the conversation the plaintiff told the defendant there was a good job coming to him which had not yet been advertised; whereupon the defendant asked the plaintiff how he would like to be in with him, and the plaintiff responded, "All right, *Markus,* I think we could make some money." The defendant said, "I would like to have you with me." The plaintiff responded, "Well, if that job comes maybe we can land it." After the city had advertised for bids plaintiff, accompanied by a friend who was in the employ of the defendant, went to the defendant's house. The defendant did not have the plans, but by arrangement the three met the next day and looked

over the ground where the work was to be done. The defendant said that he was going to figure on the job, and that if he got it the plaintiff was in with him. To this the plaintiff replied, "All right, I'm with you." The defendant then asked the plaintiff if he wanted to take the plans and specifications home, but the plaintiff replied, "No, it is no use. You are better posted on the work than I am. I handle the digging, the machine end of it, and you handle the other." On the 6th of August the plaintiff and defendant drove over a portion of the work and examined the location for the sewers on Fairfield avenue and other streets. They met again on Friday, August 8th, and the plaintiff then learned that the defendant was the lowest bidder. The plaintiff and defendant then examined a machine belonging to Franzen, plaintiff's employer. On August 9th the plaintiff and defendant went to Winthrop Harbor to look at a trenching machine. On Monday, August 11th, at the request of the defendant, the plaintiff and the defendant met an agent for the Parson Machine Company and had some talk with him about a digging machine, at which time the defendant introduced the plaintiff as, "This is my partner in the sewer business." About August 13th the defendant requested plaintiff to come to his house in respect to the machine that they had examined at Winthrop Harbor, at which time it is said that the defendant referred to the plaintiff as "My partner in the sewer business from now on." On Thursday noon, August 14th, the plaintiff went to the defendant's house, whereupon the defendant told the plaintiff that he could not get the machine at Winthrop Harbor, and suggested selling the job. The plaintiff replied, "You go ahead and sell it, as I told you long ago; sell it, if you want to sell it, but there is some money to be made over there." There was some further talk as to the amount which might be received for the contract. The next day the job was sold to Franzen. The plaintiff testified that he and the defendant were to have an agreement on the small stuff (referring

to some sewer construction work not in the contract sold and assigned) that the defendant got in addition to the $2,800. The defendant, according to the plaintiff, then told the plaintiff that he got $1,000 for the job. Upon receipt of this information the plaintiff said, "All right, *Markus,*" and then the defendant said, "You are willing to buy half of my equipment?" To this the plaintiff replied, "Yes, seeing as I started, I am willing to go through with it, but you know there is nothing in the small stuff you got in addition to Fairfield avenue." On the same night there was further talk of purchase of one half of defendant's equipment, but as an inventory could not be made until the work was finished the matter was postponed. There were further negotiations. The plaintiff claims that on August 15th the defendant said he would give him $500 as one half of the profits, and from that time on each was to draw $40 a week salary, and part of the profits of the business was to be applied on the equipment until $2,500 was paid. The defendant was to be paid $3,000 for one half of the equipment. The next day the plaintiff learned that the job had been sold for $2,800. Being somewhat disturbed he sought the defendant; whereupon the defendant told him that he got $1,000. After the defendant had repeatedly assured the plaintiff that he received only $1,000, the plaintiff said to the defendant, "It is just like this: If you will show me you only got $1,000 for the job, I will be on your shovel Monday morning as I promised to be; or, if you will come clean with half of $2,800, as you promised to have me one-half full partner. I told Franzen if you didn't do this I would be back on his shovel on Monday morning." Plaintiff then returned to Franzen's employment, and shortly after that this suit was begun.

Outside of the talk that was had on August 15th to the effect that the plaintiff was to get $500 as his share of the Fairfield avenue job, which was to be credited one half on the amount due from him to the defendant on the equip-

ment, there is nothing in the history of these proceedings, in our view of the case, that ever rose to the dignity of a contract. The agreement made on the 15th in regard to the equipment and terms on which the partnership was to be carried on was expressly repudiated by the plaintiff by returning to his employment with Franzen.

As good a way as any to test the matter is to inquire whether or not in the event the contract had sold at a loss *Thompson* could have held the plaintiff for one half of the loss. Certainly if the contract is not binding one way it is not the other, where, as here, there is no consideration except the mutual promises of the parties. Down to the 15th there is nothing showing the subject matter with which the contract was to deal; how long it was to continue; what part of the capital, if any, was to be furnished by each partner; how much was to be allowed to the partners for services rendered; whether each partner was to give his entire time to the partnership business; or any other agreement definite and certain enough to be enforceable by either of the parties. What, if anything, did the plaintiff contract to do? Mutuality of obligation is absent. *Hopkins v. Racine M. & W. I. Co.* 137 Wis. 583, 586, 119 N. W. 301; 2 Page, Contracts (2d ed.) § 569.

The evidence falls far short of sustaining an executory agreement for a partnership, in the absence of which the plaintiff cannot recover in this action. There is no showing whatever as to what liability, if any, there remains on account of the contracts not transferred to Franzen, or any attempt to show any adjustment of the partnership affairs. The plaintiff reaches out for one half of the profits on a good contract, and denies all liability or responsibility as regards the others. His refusal to proceed unless the defendant should "come clean," as he phrases it, which no doubt meant pay over one half of the $2,800, did not place him in a position where he can maintain an action at law for unascertained profits.

By the Court.—Judgment reversed.

STATE EX REL. MILWAUKEE COUNTY and another, Respondents, vs. BUECH, Sheriff, Appellant.

April 10—May 4, 1920.

Officers: Deputy sheriff: County civil service law: Waiver of regularity of eligibility list by appointing officer: Constitutional law: Uniformity of town and county government: Class legislation: Sheriffs: Common-law powers: Mandamus: Nature: Parties in interest as relators.

1. A deputy sheriff appointed by the sheriff under the provisions of sec. 723, Stats. 1915, which provides that every deputy holds his office at the pleasure of the sheriff, was not appointed for a definite term within the meaning of the county civil service law (ch. 259, Laws 1917: secs. 16.31 to 16.44, Stats. 1919).
2. By accepting from the civil service commission and acting upon an incomplete and uncertified list of persons eligible to hold the office of deputy sheriff, a sheriff waived informalities and noncompliance with the statute; and a person appointed by the sheriff from such list holds his office pursuant to the civil service law.
3. Ch. 259, Laws 1917 (secs. 16.31 to 16.44, Stats. 1919), prohibiting a sheriff from appointing deputies except such as are certified as eligible by the civil service commission, is not unconstitutional in that it detracts materially from the powers, duties, and liabilities of the sheriff, the power of the sheriff at common law to appoint deputies not being one that gave character and distinction to the office.
4. Said ch. 259, providing for the appointment of certain officers under the civil service in certain counties, does not violate sec. 23, art. IV, Const., providing that the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable, because deputy sheriffs are to be appointed from a list furnished by the civil service commission without reference to their places of residence—a variation from sec. 59.21, Stats. 1919.
5. The county civil service law (secs. 16.31 to 16.44, Stats. 1919) does not constitute a departure from uniformity in the system of county government, in violation of sec. 23, art. IV, Const., by reason of sec. 59.22, Stats. 1919, changing the liability of the sheriff for acts of his deputies in counties having a population of 200,000 or more, the latter section being enacted at a subsequent session of the legislature and constituting no inducement to the passage of the civil service law.
6. Nor is such civil service law discriminatory as in violation of sec. 1, art. I, Const. Wis., and amendm. XIV, Const. U. S.,

in that it exempts from examination for county positions and offices persons who had been on the payroll of a county continuously for four years immediately preceding the date upon which it took effect, and exempting persons being in the service and on the payroll less than four years, and requiring them to take only a noncompetitive examination.

7. *Mandamus* is essentially a civil action so far as the rules and practice as to pleadings are concerned; and a county has such a joint or common interest with that of one seeking by *mandamus* to compel the sheriff to reinstate him in the service as a deputy and place his name on the payroll that it is properly joined as a relator, in view of sec. 2602, Stats., the object of which is to determine in one suit the rights of all parties in the subject matter of the litigation.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Mandamus to compel the defendant, as sheriff of *Milwaukee County,* to reinstate the petitioner, *John B. Kozik,* in his office as deputy sheriff and to properly place and certify his name on the payroll. The petition alleges that *John B. Kozik* was duly appointed deputy sheriff of *Milwaukee County* on the 1st day of January, 1917; that defendant *Robert Buech* was elected to the office of sheriff of *Milwaukee County* in November, 1918, and entered upon the duties of his office on the first Monday of January, 1919, and thereupon appointed petitioner, *John B. Kozik,* as deputy, effective from and after that date; that the said *Kozik* filed his oath of office and executed to the said *Robert Buech* a bond in accordance with the statutes, and did thereafter make and execute an additional bond in the manner and form as provided by ch. 220 of the Laws of 1919. It alleges the passage of ch. 259, Laws 1917, creating what are now known as secs. 16.31 to 16.44, Stats. 1919, providing for the creation of a civil service commission in all counties of the state containing 200,000 inhabitants or more; that a civil service commisison was duly appointed and organized in *Milwaukee County,* the adoption of rules and regulations for the purpose of carrying out the provisions of said act, the passage of an ordinance by the county

board of *Milwaukee County* adopting a classification and salary standardized plan for compensation of offices and employments in the county classified service, providing for the establishment of procedure and regulations, and providing effective employment control, in compliance with the provisions of said act; that said civil service act and the rules and regulations of said civil service commission and the employment standardization ordinance became effective January 1, 1919; that *Kozik,* prior to the time said civil service law became effective, had been appointed as deputy sheriff for a definite term, and that when said act became effective in said county *Kozik* was in the service of said county for a definite term, and that he continued to hold his office after the expiration of said definite term under and pursuant to the terms of the act, and that he took an examination for the purpose of retaining his position as such deputy sheriff as required by the act, and that he continued to act as deputy sheriff until the 1st day of April, when defendant preferred charges against him before the civil service commission and suspended him from office; that upon the trial of such charges before the civil service commission it was determined that the charges were not well founded, and it was ordered that said *Kozik* be reinstated to his said position as deputy sheriff; that *Kozik* then presented himself for duty, but defendant refused to recognize the authority or order of the commission to reinstate said *Kozik,* and did on the 9th day of May file further charges against said *Kozik,* upon trial of which *Kozik* was again exonerated and it was ordered that he be reinstated with full pay from and after his first suspension on the 2d day of April, 1919, and that defendant refuses to so reinstate him; that the petitioner, *Milwaukee County,* ever since said 2d day of April, 1919, has been without the service of said *Kozik* as deputy sheriff of said county by reason of the wrongful and unlawful conduct of said defendant, *Robert Buech.*

The defendant moved to quash the alternative writ, which

motion was overruled. He then made return to the alternative writ in which he denied that *Kozik* continued to hold his position as deputy sheriff under said civil service act after the expiration of said definite term, denied that for the purpose of retaining his position as deputy sheriff the said petitioner, *Kozik,* ever took or passed the examination provided by the terms and provisions of said civil service act, denied that he wrongfully or unlawfully suspended said *Kozik,* or that he refused to recognize any valid order or any valid determination of the civil service commission, or that he wrongfully or unlawfully refused to place the name of *Kozik* on the payroll of *Milwaukee County,* and further alleged that said *Kozik* never took or passed, for the purpose of retaining his position as such deputy sheriff, the examination, or any examination, provided for by the civil service law, and never became entitled to retain his position as deputy sheriff after the 6th day of January, 1919, under and by virtue of the civil service law, and that whatever right or title he had to the office of deputy sheriff on or after the 6th day of January, 1919, arose out of and was based upon the appointment of said *Kozik* as deputy sheriff on the 6th day of January, 1919, and that such appointment carried with it the right of discharge of said *Kozik* by defendant.

The return further alleged that said civil service act is unconstitutional and void, in conflict with and violative of the state constitution and of the Fourteenth amendment of the constitution of the United States, and that all the acts and doings thereunder, alleged and set forth in the petition of relators herein, were void and were done and performed without jurisdiction, and that neither of the relators herein has acquired any rights thereunder. It is also alleged that there is a misjoinder of relators herein, and that the said relators have neither a common nor joint interest in the subject matter of the petition, and that *Milwaukee County* has no interest in the subject matter thereof.

The issues thus formed were tried before the court, resulting in findings of fact and conclusions of law, upon which judgment was entered granting the peremptory writ as prayed for by relators. From the judgment so entered the defendant sheriff appealed.

For the appellant there was a brief by *Curtis & Mock* of Milwaukee, and oral argument by *H. K. Curtis.*

Winfred C. Zabel, district attorney of Milwaukee county, *William L. Tibbs,* special assistant district attorney, and *Daniel W. Sullivan,* first assistant district attorney, for the respondents.

OWEN, J. Sec. 16.43, Stats. 1919 (the civil service law in question), provides:

"All persons included within the classified service of any county, at the time sections 16.31 to 16.44, inclusive, go into effect therein, appointed for a definite term, shall be required to take examinations under said sections, as soon as practicable after the expiration of such definite term, except persons who have been on the payrolls of such county continuously for the four years immediately preceding the date upon which said sections go into effect in said county; and except that all such persons being in service and on the payroll of said county less than four years preceding such date shall, in order to retain their offices or positions, be required to take a noncompetitive examination, and shall retain their offices or positions, unless upon such examination they be found and determined by said board to be insufficiently qualified."

The first question to be considered is whether *Kozik's* right to the office of deputy sheriff is by virtue of this section or by virtue of his appointment thereto by the sheriff on January 6, 1919. It is the contention of the sheriff that if his title to the office is derived through and by virtue of this section, then his appointment thereto is a legislative appointment, and void, under the principle governing the decisions in *Cole v. President, etc. of Black River Falls,* 57 Wis. 110,

14 N. W. 906; *State ex rel. Hamilton v. Krez,* 88 Wis. 135, 59 N. W. 593; *O'Connor v. Fond du Lac,* 109 Wis. 253, 85 N. W. 327; *State ex rel. Dithmar v. Bunnell,* 131 Wis. 198, 110 N. W. 177. It is therefore necessary to determine at the outset the source of *Kozik's* title to the office. If derived through and by virtue of the section of the statutes quoted, it will be necessary to consider whether his title thereto is void as resting upon legislative appointment, otherwise not.

The original theory of the petitioner seemed to be that the provisions of this section were effective to continue him in office and that his title thereto was referable to this legislative enactment rather than to his appointment of January 6, 1919. Sec. 16.43 deals with persons included within the classified service who are appointed for a definite term. It provides that, unless they have been on the payroll of such county continuously for the four years immediately preceding the date when the law takes effect, they shall be required to take noncompetitive examinations after the expiration of such definite term, and they shall retain their offices or positions unless, upon such examination, they shall be found and determined by said board to be insufficiently qualified. The contention of *Kozik* was that he was appointed for a definite term ending on January 6, 1919, and that he continued to hold his office thereafter unless upon the noncompetitive examination it was found and determined by the civil service commission that he was insufficiently qualified therefor. In order to be within this provision of the statutes he must have been appointed for a definite term. *Kozik* was appointed under the provisions of sec. 723, Stats. 1915, which provide: "Every deputy shall hold his office at the pleasure of the sheriff." In view of this provision, it seems plain that *Kozik* was not appointed for a definite term, for which reason his office was not comprehended within the provisions of sec. 16.43. His appointment, therefore, was not a legislative appointment,

and the question whether it was competent for the legislature to provide for his retention in office under the plan of sec. 16.43 is not before us.

It is necessary to ascertain, however, just what his right or title to the office is. The trial court found that on the 31st day of October, 1918, and the 1st day of November, 1918, the deputy sheriffs of said county were required by the county civil service commission to take, and did take, an examination under the provisions of the civil service act for the purpose of determining, and which did in fact determine, the merits and fitness of each of said deputy sheriffs to retain his said office and to continue in the service of the county as such; that *Kozik* took such examination, and that as a result thereof the civil service commission found and determined that *Kozik* was sufficiently qualified to hold and retain his said office as deputy sheriff of said county; that prior to the first Monday in January the sheriff had been fully informed that said examination for the deputy sheriffs had been held, and that immediately prior to the first Monday in January, 1919, he procured from the chief examiner of said civil service commission a list of the names of deputy sheriffs of said county found and determined by said civil service commission to be sufficiently qualified to hold their office and position as deputy sheriff; that said list was correct and included the name of *John B. Kozik;* that said list was not certified by said chief examiner, and did not have one additional name for each additional vacancy, as provided in sec. 16.35; that the defendant thereafter made the selection and appointment in writing of the said *Kozik* and certain other persons from said list to serve as such deputy sheriffs and filed said appointment in the office of the clerk of the circuit court of said county; that defendant accepted a bond from said *Kozik* pursuant to sec. 724, Stats. 1917; that thereafter and up to the time of his suspension on April 1, 1919, said sheriff at all times recognized and treated said *Kozik* as one of the duly appointed, qualified, and

acting deputy sheriffs of said county and as entitled to continue and retain his said office and position as deputy sheriff of said county, pursuant to the provisions of said civil service act.

While there was some informality and noncompliance with the statute in the manner and method of certifying the names of persons eligible to the appointment of the office of deputy sheriff, the trial court considered that these informalities were waived by the sheriff by his failure to insist upon compliance therewith at the time of asking for the names of persons eligible for appointments as deputy sheriffs, and that from all the facts and circumstances, and especially in view of the fact that the sheriff considered it necessary to file charges with the civil service commission in order to consummate the removal of *Kozik,* it was plain that the sheriff appointed *Kozik* a deputy under and pursuant to the civil service laws, rules, and regulations, and that *Kozik* was entitled to the protection thereof. We think the conclusion of the trial judge is correct. The sheriff was prohibited from appointing any deputy sheriff except such as were found and certified as eligible by the civil service commission. It is clear that he intended to comply with the law in this respect, and that he considered *Kozik* an appointee under the provisions and subject to the protection of the civil service law, rules, and regulations. The title of *Kozik* to the office, therefore, rests upon appointment by the sheriff made on the 6th day of January, 1919, and is not in any manner referable to the provisions of sec. 16.43.

It is contended by appellant that the so-called civil service law is unconstitutional in so far as it applies to the office of sheriff of any county. It is said that at common law the sheriff had power to appoint deputies and it is not competent for the legislature to detract materially from the powers, duties, and liabilities of the sheriff, and reference is made to the case of *State ex rel. Kennedy v. Brunst,* 26 Wis. 412. In that case it was held that a law which assumed

to take from the sheriff the duties of jailer of a county and confer them upon another officer appointed by the county board was unconstitutional, because it took from the sheriff an important common-law duty which was impliedly attached to the office by the constitution. In the opinion in that case it is said:

"It is quite true that the constitution nowhere defines what powers, rights, and duties shall attach or belong to the office of sheriff. But there can be no doubt that the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted. Among those duties, one of the most characteristic and well acknowledged was the custody of the common jail and of the prisoners therein."

With no disposition to question the doctrine of that case, we do not think it should be extended to the extent here urged. We think it should be confined to those immemorial principal and important duties that characterized and distinguished the office. While at common law the sheriff possessed the power to appoint deputies, it was not a power or authority that gave character and distinction to the office. Many other officers as well as sheriffs possessed the power. It was more in the nature of a general power possessed by all officers to a more or less extent and was not peculiar to the office of sheriff. It should not be held, in our judgment, that the constitution prohibits any legislative change in the powers, duties, functions, and liabilities of a sheriff as they existed at common law. If that were true, a constitutional amendment would be necessary in order to change the duties of sheriffs in the slightest degree and, in this respect, "the state would be stretched on a bed of Procrustes."

This view makes it unnecessary to consider whether the sheriff has in fact been deprived of the power of appointment; the power of the legislature to prescribe reasonable

regulations for its exercise, or to require specified qualifications of the appointee, such qualifications to be ascertained in the manner prescribed by the legislature, even though the power of appointment was preserved to the sheriff by constitutional provisions.

It is next contended that the act is invalid because it violates sec. 23, art. IV, of the constitution, which provides: "The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

This argument is based upon the provisions of sec. 59.21, Stats., which requires the sheriff to appoint a deputy sheriff for each city and village in the county having 1,000 or more inhabitants and one for each assembly district therein, except the district in which the undersheriff resides, which contains an incorporated village having less than 1,000 inhabitants and does not contain a city or incorporated village having more than 1,000 inhabitants. It is pointed out that under the county civil service regulations the deputies must be appointed from a list furnished by the civil service commission and that they are selected without any reference to their places of residence, for which reason compliance with the section quoted is impossible, and that in counties where the county civil service law is in force sec. 59.21 is practically inoperative, thus destroying the uniformity of the system of county government. This constitutional provision has been frequently considered by this court, and it is established that it does not require an absolutely uniform system of county government but only a system that is as nearly uniform as practicable. *State ex rel. Sommer v. Erickson,* 120 Wis. 435, 98 N. W. 253; *State ex rel. Busacker v. Groth,* 132 Wis. 283, 112 N. W. 431. Counties may be classified according to population. *Verges v. Milwaukee Co.* 116 Wis. 191, 93 N. W. 44; *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071. The desirability of substituting the merit for the spoils system in the

county service in counties of 200,000 population or over and the impracticability of its maintenance (especially the machinery for its administration) in smaller counties, is obvious. We readily conclude that it was competent for the legislature to provide a civil service system in counties having a population of 200,000 or over, and the law is not to be declared invalid because in some trifling particular, such as the variation in the number of deputy sheriffs, it constitutes a departure from absolute uniformity.

In this connection our attention is called to sec. 59.22, Stats. 1919, as another departure from absolute uniformity in the system of county government for which this law is responsible. Sub. (3) of that section was enacted as ch. 220 of the Laws of 1919, and provides that, in counties having a population of 200,000 or more, deputy sheriffs shall execute and file an official bond and be liable for their defaults in the same manner and to the same extent that the sheriff would otherwise be liable, and that actions therefor shall be prosecuted directly against the deputy and the surety on his official bond. It also provides that the sheriff shall not be responsible for the acts, defaults, or misconduct in office of the deputy. Prior to the enactment of this provision (and now in every county having a population of less than 200,000) the sheriff was responsible for the defaults of his deputies. This circumstance is urged against the constitutionality of the civil service law. A very effectual answer to this contention is that the provision in question is no part of the civil service law, and neither its construction nor validity is involved in this case. It in no manner affects the right or title of *Kozik* to the office of deputy sheriff, and that is the question here involved. Even though this act be unconstitutional, it could have no effect whatever upon the validity of the county civil service act. As before stated, it is no part of the civil service act, it was enacted at a subsequent session of the legislature, and could constitute no inducement to the passage of the civil service law.

It is further contended that because of the provision of

the county civil service act exempting from examination persons who have been on the payroll of such county continuously for the four years immediately preceding the date upon which the civil service law took effect and exempting persons being in the service and on the payroll of the county less than four years and requiring the latter class to take only a noncompetitive examination to retain their offices or positions, it is discriminatory and class legislation, in violation of sec. 1, art. I, of the state constitution and of the Fourteenth amendment to the constitution of the United States. Cases condemning similar laws exempting from examination, or giving special privileges to, veterans, are cited in support of this contention. The principle governing the decisions in those cases is not applicable here. Here the classification is germane to the purpose of the legislation. The purpose of the legislation is to measure fitness and qualification on the part of those engaged in the public service. The mere fact that a person served in the Civil War gives no evidence of such qualifications, while long continued service in the position to be filled does give such evidence. In the one case the classification is clearly arbitrary, while in the other it is based on reasons germane to the purposes of the law. The contention is without merit.

It is claimed that the county of *Milwaukee* has no interest in the subject matter of this proceeding, but that, if it has, its interest is not a joint or common interest with that of the petitioner, *Kozik*. It is conceded that persons having a joint or common interest in the subject matter in controversy may be joined as relators, but it is claimed that where their interest is several or distinct they cannot be so joined. The county of *Milwaukee*, through its proper agency, has determined the number of deputies necessary to discharge the business of the county. If *Kozik* has a legal title to the office of deputy sheriff, the county is responsible for his salary. Its interest, therefore, is double: first, it is interested in the proper dispatch of the county's business for which the employment of *Kozik* is necessary; and secondly,

in view of the fact that it must pay *Kozik* his salary, it is interested in having him discharge the duties of his office. It seems clear to us that this vests *Milwaukee County* with an interest in this controversy. The question now is whether *Milwaukee County* and *Kozik* may unite in maintaining this proceeding. It has long been established in this state that a proceeding by *mandamus* is essentially a civil action so far as the rules and practice as to pleadings are concerned. *State ex rel. Green Bay & M. R. Co. v. Jennings,* 56 Wis. 113, 14 N. W. 28; *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672, 678, 70 N. W. 300; *State ex rel. Rice v. Chittenden,* 107 Wis. 354, 83 N. W. 635. By sec. 2602, Stats., it is provided that "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided by law." The object of this statute is to determine in one suit the rights of all parties in the subject matter of the litigation, and, as stated in *Beck v. Ashland C. & T. Co.* 146 Wis. 324, 330, 130 N. W. 464, "A statute framed to secure such desirable results by such simple, direct means, and passed for the express purpose of obtaining relief from the technicalities of the common-law rules of pleading, should receive a liberal construction." While it may be conceded that appellant's position is not without support in the authorities based upon the common-law rules of pleading, to apply the doctrine of such cases here would be to consummate exactly what the legislative and judicial tendency of this state seeks to avoid, namely, the unnecessary protraction of litigation. Its application would mean a dismissal of this action and further litigation before the rights of the parties can be determined; a result that could be justified, even in the absence of the statute, only by slavish fidelity to an antiquated rule, a distinction this court neither covets nor enjoys. We hold that there was no misjoinder of relators.

By the Court.—Judgment affirmed.

SCOTT, Plaintiff in error, vs. THE STATE, Defendant in error.

April 10—May 4, 1920.

Food: Cheese with surplus moisture content: Sale: Cheese in process of manufacture: Criminal law: Intent: Admission of defendant tantamount to a plea of guilty: Effect on errors at the trial.

1. Where cheese manufactured for sale or exchange was sent from defendant's factory into the channels of trade for sale or exchange containing a larger percentage of moisture than that permitted by sub. (9), sec. 4601—4*a*, and sec. 4601—7, Stats., defendant was guilty of a violation of the statute, though it was sent from the factory contrary to his order and without his knowledge or consent, as the manufacturing process must be presumed completed, and no other intent than that of manufacturing for sale or exchange is required.
2. As long as the process of manufacturing cheese is not completed and there is no intent to offer to sell or exchange it in its then condition, there is no violation of the statute, though the cheese contains more than forty per cent. of moisture.
3. The admission of the defendant that cheese containing a larger percentage of moisture than that permitted by statute was sent from his factory into the channels of trade for sale or exchange amounted to a plea of guilty and rendered all errors complained of immaterial.

ERROR to review a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action for violation of sec. 4601—7, Stats. 1919, providing that

"Any firm or corporation who shall, by themselves, their servant or agent, and any person who shall, by himself, his servant or agent; or as the servant or agent of another person, or as the servant or agent of any firm or corporation, manufacture for sale or exchange, sell, exchange, offer for sale or exchange, or have in possession with intent to sell or exchange any cheese which contains more than the permitted amount of moisture as provided in subsection (9) of section 4601—4*a* of the statutes, shall be fined not less than twenty-five nor more than one hundred dollars, or be im-

prisoned in the county jail not less than thirty days nor more than four months."

The case was begun in justice's court, and upon conviction defendant appealed to the circuit court, where the jury found him guilty, and he was adjudged to pay a fine of $50 and costs. To review such judgment he sued out a writ of error.

M. C. Mead of Plymouth, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *Charles Voigt,* district attorney of Sheboygan county, and oral argument by *Mr. J. F. Baker,* assistant attorney general, and *Mr. Voigt.*

VINJE, J. Defendant was convicted under sec. 4601—7, Stats. 1919, of manufacturing for sale and selling American cheese containing more than forty per cent. moisture, which is the maximum amount permitted by sub. (9) of sec. 4601—4*a,* Stats. 1919. He ran a cheese factory in Sheboygan county, and on June 13, 1919, the cheese in question was sent from his factory to a selling association in Plymouth known as the Federation, where a sample thereof was taken and analyzed and found to contain 41.19 per cent. moisture. Defendant upon the trial admitted that the cheese contained 41.19 per cent. moisture, but claimed that it was sent from the factory in violation of his order, and that was the issue that went to the jury,—the court instructing them that if they found it was sent from the factory contrary to defendant's order and without his knowledge or consent they should acquit him. This instruction was more favorable to defendant than the law permits. The admission that the cheese contained more than forty per cent. of moisture and was sent into the channels of trade was in effect a plea of guilty. So far as a manufacturer who puts into the channels of trade cheese with excess moisture is concerned, no question of intent, except that of manufacturing for sale or exchange, is involved. In the instant case there was no contention made that the cheese was not manu-

factured for sale or exchange. In such case the violation is complete when cheese containing an excess of moisture is put into the channels of trade or is offered for sale or exchange. Such manufacturer may also violate the law and subject himself to the prescribed penalty by having in his possession cheese having an excess of moisture with intent to sell or exchange the same in that condition if intent to sell in that condition is shown. But this is not such a case. Here cheese was sent from the factory into the channels of trade. When that is done by a manufacturer of cheese for sale or exchange, or when the cheese is offered for sale or exchange, the manufacturing process must conclusively be presumed to be completed, and the statute in such cases provides for proof of no other intent than that of manufacturing for sale or exchange, which was here both admitted and proven.

As long as the manufacturing process, by whatever means accomplished, is not completed and there is no intent or offer to sell or exchange the cheese in its then condition, there is no violation of the statute. For confessedly cheese in its initial stages of manufacture must contain more than the maximum amount of moisture permitted in the finished stage. The law concerns itself only with the quantity of moisture the cheese contains when it is held with intent to sell in its then condition, or when it is offered for sale or exchange or when it is actually sold, exchanged, or put into the channels of trade.

Since the defendant was a manufacturer of cheese for sale and since he admitted an excess of moisture in the cheese when it was sent from the factory into the channels of trade, no intent to violate the law need be proven to establish his liability. The admission of the amount of moisture in the cheese sent out for sale was tantamount to a plea of guilty and rendered all other errors complained of immaterial.

By the Court.—Judgment affirmed.

BRUNO, Plaintiff in error, vs. THE STATE, Defendant in error.

April 10—May 4, 1920.

Arson: Sufficiency of evidence to support conviction: Criminal law: Degree of proof required.

1. Where the only evidence supporting a verdict convicting the defendant of arson was the testimony of two witnesses to the effect that they had heard him threaten to burn the property, and testimony concerning the apparent identification o defendant's rubber boots with certain plaster casts of foot-prints discovered near the burned buildings, and where the witnesses who testified as to threats were manifestly actuate by animosity towards the defendant, and there was no proof that the foot-prints were made at or about the time of t. fire. the conviction will be set aside.
2. A conviction of a penal offense cannot be sustained unless the testimony as to the guilt of defendant meets the rigid test of satisfying beyond a reasonable doubt, mere suspicion of his guilt not being sufficient.

ERROR to review a judgment of the circuit court for Clark county: E. C. HIGBEE, Judge. *Reversed.*

The defendant was charged with the crime of arson in having burned in the nighttime of August 25, 1919, the barn and other buildings belonging to one Joseph Hickman. He was found guilty by a jury and sentenced to imprisonment for ten years in the state prison. To review such judgment he prosecutes this writ of error.

Andrew Gilbertson of Milwaukee, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. F. Baker,* assistant attorney general, and oral argument by *Mr. Baker* and *Mr. F. A. Jackson,* district attorney of Clark county.

ESCHWEILER, J. The only question raised by plaintiff in error is that the evidence is insufficient to support the verdict of guilty and the judgment of conviction.

The defendant in error, about thirty-three years old, unmarried, lived with his father, Leander Bruno, and his mother in the farm house of the father about half a mile distant from the farm house owned by one Joseph Hickman and in a southeasterly direction therefrom. The Hickman house was a short distance south of an east-and-west highway. Southeast of the house was a granary with a garage at one end. Seven or eight feet to the east of the end of the granary was a large barn. Directly south of the barn was a small strip of land in which were planted seven or eight rows of potatoes. About 100 feet south of the barn was a small fenced cornfield. South and partly to the east of the Hickman property was a forty-acre piece belonging to defendant's father. South and partly to the west was a forty-acre piece belonging to one Lockbaum. The map offered in evidence as to these premises and in the record before us was not drawn to scale, and it is impossible either with that or from the testimony in the record to give the respective differences in space between the various locations with accuracy.

The fire, evidently of an incendiary nature from the manner of its burning and the odor of kerosene detected by those who first reached it, was discovered shortly after midnight by Mrs. Hickman. The fire was then burning well up on the side of the granary next to the barn and from there it spread to the barn, which was substantially destroyed.

The following situation is disclosed as existing between the Bruno and the Hickman families:

In October, 1916, a so-called charivari was held in front of the home of defendant's father; the occasion of such party appearing to be that it was claimed by the participants that Hazel, the foster-daughter of defendant's father, was just married to one William Karpinski, both of whom were at the house on this occasion. One of the Hickman boys was shot at that time by Leander Bruno, the father. He was convicted for that offense and brought his case to this

court for review. *Bruno v. State,* 165 Wis. 377, 162 N. W. 167. Subsequently his sentence appears to have been commuted by the governor in June, 1917, to thirty days in the county jail. In August, 1917, on the public highway, the two Hickman boys and Casimir Karpinski, brother of the above mentioned William Karpinski, with others, violently assaulted the defendant. At about the same time an estrangement arose and continued during this trial between the foster-daughter with her husband and the Brunos.

After such assault the defendant caused a criminal prosecution to be instituted against the Hickman boys, Casimir Karpinski, and others, in which action the defendants were convicted of such assault and battery. Thereupon the defendant here brought a civil action against the same parties for the injuries received at that time, and they in turn counterclaimed for damages against him on account of the transaction at the charivari party in October, 1916. This civil action was tried the day following the verdict in this case, and the jury found for the plaintiff there, defendant here, and assessed nominal damages only.

The only evidence which can be considered or is urged here as supporting the verdict is based upon the testimony of defendant's foster-sister, Hazel Karpinski, and that of her husband, William Karpinski, and testimony concerning the apparent identification of defendant's rubber boots with certain foot-marks discovered the day following the fire in the cornfield south of the Hickman barn and in the woods still further south.

Hazel Karpinski testified in substance on the trial that after the charivari party of October, 1916, and again after the assault committed on defendant in August, 1917, the defendant *Bruno,* referring to the Hickmans and Karpinskis, said that he would "burn them up or blow them up or something," and that old man Hickman was just as bad as the boys if not worse.

On cross-examination she admitted that on the prelimi-

nary examination in this matter she had in at least three instances lied in her testimony, in that at the preliminary she had falsely testified that she had not heard the Brunos say they would do anything to Joe Hickman (owner of the burned barn) or to his property, and that the defendant did not refer, in the statements he had made, to said Joseph Hickman; and further this statement: "I didn't hear them say they would do anything against the old Hickman, they had it in for the boys."

On redirect examination she testified that she answered that way at the preliminary because she did not dare to make any other answer because the two Brunos sat there and she was then and still is afraid of defendant.

William Karpinski, her husband, testified on the trial that he heard the defendant say, referring to Joseph Hickman, that "if the law didn't even I will even it up; I will take the law myself," and the further statement that defendant would "poison the stock, and if he didn't poison the stock to burn them up or blow them up." On the preliminary examination, in answer to the question as to whether he heard defendant say how he was going to get even with the Hickmans, this same witness answered: "He didn't say how, but he said they were going to get even some way."

At the close of the testimony the defendant moved for his discharge on the ground that the testimony was insufficient. The court in overruling the motion said: "Well, it isn't strong, of course; it is a very weak case." After the verdict of the jury the defendant moved to set aside the verdict and grant a new trial. In disposing of these motions the court said in substance:

"Well, there are a number of things in respect to this case that were not entirely satisfactory to the mind of the court and I might mention them."

He then recites the facts concerning the awakening of Mrs. Hickman, the first to discover the fire, by the passage of an automobile along the highway in front of their home,

and the fact that no investigation was made by the public authorities in respect to that automobile. That it was evident that suspicion pointed to the defendant because of the animosity that existed between the Bruno family and the Hickmans. He recited the facts above stated as to the prior relationship of the two families and the estrangement between the foster-daughter with her husband and the Brunos and that there was bad blood between the Bruno and Hickman families. In commenting upon the testimony of the foster-daughter, Hazel, and her husband, William Karpinski, he said:

"I have in my own mind a great deal of hesitancy in believing that testimony. The other case I have just listened to as to what occurred on the 1st day of August, 1917, leads me to think and feel that the testimony of Hazel and her husband is very unsatisfactory. They seem to be actuated by a feeling of animosity, and in these two cases that have been tried before me I have been so convinced that there has been a great deal of perjury committed in these that I feel some reluctance to credit that testimony. But however I think, that was clearly matter for the jury to consider."

He then stated that the question of the credit to be given to the witnesses and the fact that the fire was undoubtedly through incendiary causes were proper considerations for the jury. And further:

"Now the only way the defendant is connected with that testimony is the foot-prints in the field towards his house through the cornfield. I confess that when the evidence was first offered, in view of the length of time that existed since the field had been cultivated, that I felt some doubt as to whether or not those foot-prints could be as distinct as would be necessary to have them in order to identify them positively."

He refers to the standing, reputation, and undoubted integrity of the witness who made the plaster casts, and said that were it not for that,

"I should have felt very strongly like directing an acquit-

tal." . . . "Now the evidence of these casts is on all-fours with the evidence of finger-prints. While it is true that rubbers of that size and of that make undoubtedly exist in great numbers, it is not one chance in a million probably that any two rubbers worn to the extent that these have been could be found that would show the exact amount of wear, the same amount of wear exactly, so as to leave the lines and imprints precisely the same. It seems that this cast of the track and the bottom of the rubber do show precisely the same wear, the same number of ridges left. If that is so, there is little chance to doubt that the foot-prints were made by a man wearing these rubbers. The rubbers were found in the defendant's room; it was practically conceded they were his rubbers. This evidence all taken together I think justifies, that is it warrants, the finding of guilt in my judgment. I do not think the court ought to undertake to set up his judgment against the judgment of the jury. I want to say, however, that the impression made upon my mind by the deportment and appearance of the defendant was extremely favorable. He told his story with a great deal of frankness and apparent honesty. And it is an unpleasant thing for me to be forced to conclude that he is guilty of such a crime as this, but it is the conclusion that I feel I am forced to take."

The examination of the record in this case convinces us that the trial court was more than warranted in feeling as he did that the record at most made a very weak case against the defendant. He was particularly warranted in what he suggested as quoted above with reference to the testimony of the foster-daughter, Hazel Karpinski, and her husband.

We think also that too much weight and reliance was placed by the trial court upon the evidence as to the finding of foot-marks as of some one walking in the cornfield south of the barn in the general direction between the Bruno home and the Hickman barn.

The cornfield over which the tracks were traced was loose clay which had been cultivated about two months before then and was at the time dry. To warrant a legitimate inference that such foot-marks were made by the defendant

in going to and from the Hickman premises at the time of the fire, it was necessary that it should appear with some degree of reasonable probability that these foot-marks were not more than twenty-four hours old and that they were made by the identical pair of rubbers which had been obtained by one of the witnesses when he and several others, the day following the fire, went to defendant's home, asked for and obtained them. That such impressions were of just the right age, and no more, to meet the exigencies of the situation, was, as we view the testimony in the record, too clearly speculative to be of substantial weight. The boots themselves and the plaster-cast impressions made of the foot-marks are before us, and from a careful study of them in our judgment they do not so sustain the conclusion, apparently confidently arrived at in the testimony of the witnesses, as to their being an accurate resemblance between the worn surfaces and marks on the rubbers and what is shown by the plaster casts, that we can be justified in feeling that, in connection with the other evidence, it warrants the conclusion, beyond a reasonable doubt, that the defendant, wearing this particular pair of rubbers, went through this cornfield in the direction of the Hickman barn at or about the time of the fire. Without a reasonable inference in that regard there is no support for the verdict.

Much stress was laid by the trial court, as indicated in his quoted statement, as to the standing and reputation of the witness who made the plaster cast of the foot-marks and the comparisons with the rubber boots. It is not here, however, a question of the veracity of the witness that is involved in considering the weight which is to be given to that which is but a conclusion of the witness upon certain physical facts.

There is no suggestion in the record, so far as we can discover, as to how it happened that the one foot-print from which an impression was taken was in the Lockbaum woods and directly south of the Hickman premises and southwest of the defendant's home and therefore not in the line be-

tween the two premises. This greatly weakens, if not entirely destroys, any inference that might be drawn from the fact that the tracks going through the cornfield were nearly in line with the general direction between defendant's home and the Hickman barn.

Loath as this court has always been and still is to set aside a judgment based upon a verdict of guilty by a jury and which has passed the careful consideration of a trial court, we are nevertheless compelled in a case such as this, involving a crime of such a grave nature and in which the verdict of guilty by the jury was followed by punishment measured by a sentence of ten years' imprisonment in the state prison, to feel the necessity of bearing steadfastly in mind the well established rule of law that no person shall be convicted of a penal offense unless the testimony be such as will sustain the rigid test of satisfying beyond a reasonable doubt.

Our judgment, after a consideration of the entire record, compels us to the conclusion that defendant's guilt was not sufficiently proven, and the verdict therefore cannot be upheld as the result of such a fair and impartial trial as every accused person is entitled to have under the law of this state. *Gerke v. State,* 151 Wis. 495, 139 N. W. 404; *Koscak v. State,* 160 Wis. 255, 269, 152 N. W. 181; *Kuhl v. State,* 167 Wis. 495, 499, 167 N. W. 743.

The testimony in this case, in our judgment, when reasonably and fairly construed, creates no more than a suspicion that the defendant committed this offense. A suspicion merely is insufficient to support a judgment of conviction. *Lonergan v. State,* 111 Wis. 453, 460, 87 N. W. 455; *State v. Vandewater* (Iowa) 176 N. W. 883.

The evidence being insufficient to warrant a conviction, the defendant must be discharged.

By the Court.—Judgment reversed, with directions to discharge the defendant.

STATE, Respondent, vs. ZIRBEL, Appellant.

April 10—May 4, 1920.

Infants: Juvenile court: Powers: Rules of criminal procedure not applicable: Final determination of proceedings: Effect.

1. The responsibility assumed by the juvenile court under the juvenile court act (secs. 573—1 to 573—10, Stats.) over a delinquent child is the same as that of a parent and necessarily carries great power, autocratic to the extent that it shall not be confined by the rules of procedure followed in criminal courts.
2. On the trial in the juvenile court of a fifteen-year-old boy charged with theft, the court was not warranted in committing him to the industrial school solely on proceedings had before another judge wherein such judge, after the probation officer to whom the boy had been assigned requested to be relieved of the charge, expressed his view that the boy should be committed to the industrial school, but upon objection of the parents to that course dismissed the proceedings and placed all responsibility for the boy upon the parents. Such dismissal, being in substance a final determination of all charges of delinquency, cannot be made the basis of a commitment in subsequent proceedings.

APPEAL from a judgment of the juvenile court of Milwaukee county: M. S. SHERIDAN, Acting Judge. *Reversed.*

The complaint charged the defendant, a boy fifteen years of age, with having stolen tools belonging to Dr. William F. Hilger of Milwaukee. At the trial the court received testimony of a police officer in connection with the offense charged, and also admitted the testimony as to the previous record of defendant from a probation officer, to whom the defendant had been assigned on probation.

The court declared the defendant to be a delinquent and committed him as delinquent and incorrigible to the Wisconsin industrial school for boys. Appeal is taken from the judgment and from an order of the court refusing to vacate such judgment upon proceedings had after the entry of the judgment of commitment to the industrial school.

Carl H. Juergens of Milwaukee, for the appellant.

For the respondent there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *Arthur H. Bartelt,* assistant district attorney, and oral argument by *Mr. Zabel.*

SIEBECKER, J. The record shows that on October 3, 1919, the defendant was brought into the juvenile court, Judge KAREL presiding, by the probation officer to whom he had been committed as a ward of the court, on the several complaints theretofore filed against him as a delinquent. The defendant contends that the proceedings had in court on this occasion constitute a discharge of the defendant from all delinquencies, and that such discharge terminated all orders of probation theretofore entered upon the several complaints filed against him. The state claims to the contrary and asserts that defendant was still a ward of the court after October 3, 1919. The purposes and objects of the juvenile court act (secs. 573—1 to 573—10, Stats.) are well expressed in the opinion in *State v. Scholl,* 167 Wis. 504, 167 N. W. 830. The proceedings are not to be conducted according to the practice and procedure governing actions. The court is to act in place of a parent and necessarily has great power which is not to be restricted by the rules of procedure followed in criminal courts. The question presented is, Could the court properly commit the defendant to the industrial school upon the record before him in view of the action of the court on October 3d? The court stated in passing on this question of committing the boy: "This boy was not sent to Waukesha [the industrial school] for stealing the saw." There is no evidence in the record to show that he was guilty of the charges lodged against him on November 24, 1919, upon the complaint of the officer, Kammerling, in which proceeding the commitment was issued. So far as the evidence discloses, he was innocent of any wrongful conduct concerning the transaction set forth in the Kammerling complaint. The court, however, held that

the statements of Mr. Mehl, probation officer, on this hearing, giving the boy's delinquent history on former complaints, and Mr. Mehl's inability as probation officer to aid and help the boy and his parents while defendant was committed to him as a ward of the juvenile court for the three years last past, authorized the court to commit the boy to the industrial school. It appears that all the delinquent proceedings against the boy prior to November 24, 1919, took place before Judge KAREL, and that Judge KAREL on October 3, 1919, at the request of Officer Mehl, held an inquest concerning the continuance of the probation of the boy as a ward of the court. It was suggested by the officer that the boy's three years' probation had not operated to the boy's benefit and that the officer was unable to control him, and asked to be relieved of his charge as probation officer. The court then expressed the view to the boy's parents, who were present in court, that he thought it for the best interest of the boy to have him committed to the industrial school, to which the parents objected. Thereupon the court dismissed the proceedings against the boy and informed the parents that they had assumed all responsibility for him. In substance this is a final determination and dismissal of all pending proceedings against defendant for delinquency. Under this state of the record these proceedings could not be made the basis by Judge SHERIDAN in another and subsequent proceeding for a commitment of defendant to the industrial school. Since the record of the proceedings pending in the complaint before Judge SHERIDAN discloses a want of evidence to establish the conviction of defendant as a delinquent and no commitment could be made on the former proceedings, it follows that the judgment appealed from is not sustained by the record.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the juvenile court with directions to discharge the defendant.

FLAMME and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

April 12—May 4, 1920.

Criminal law: Self-incrimination: Voluntary confession: Sworn statement made before district attorney: Repetition of statement by testimony on preliminary examination: Separate trials for joint defendants: Discretion of court: Argument of counsel: Reference to fact not in evidence.

1. A sworn statement by defendant before the district attorney, after she had gone to his office with and at the request of the sheriff and at first had denied guilt, is not a voluntary confession and therefore is incompetent as evidence against her.
2. Defendant's repetition on preliminary examination of a confession is *held* not free of the duress that had attended it from the beginning; the facts and circumstances showing that she obviously acted on the belief that her written and sworn confession to the district attorney compelled her to repeat it before the police justice.
3. The question of granting or refusing separate trials to defendants jointly informed against for offenses arising out of the same transaction is largely within the discretion of the trial court.
4. The denial of separate trials is an abuse of discretion where the confession of one defendant, admissible against her but not against her codefendant, must inevitably operate to the prejudice of the rights of the codefendant.
5. The statement of the district attorney of his knowledge of a fact, a matter not in evidence, is not permissible in argument, and on objection the jury should be cautioned not to consider it.

ERROR to review a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

The information charged *Wesley A. Flamme* with the crime of adultery committed with *Mabel Banker,* an unmarried woman, on May 22, 1919. In a separate count it charged *Mabel Banker* with the crime of fornication. The defendants, *Wesley A. Flamme* and *Mabel Banker,* were arrested upon separate complaints in separate actions and

separately held for trial. They were first jointly proceeded against by the district attorney by the filing of one information in the circuit court.

Mabel Banker claims that a statement was obtained from her by coercion on the part of the district attorney on May 23, 1919; that the sheriff had appeared at her home earlier in the day and she was requested to accompany him to the office of the district attorney; that she accompanied him under the impression that she was under arrest; that at first she denied the charges made against her by the district attorney; that no one told her that she was not obliged to incriminate herself; and that finally, after having been subjected to questioning for a period of over an hour, she was induced to sign a statement prepared by the district attorney, in which she confessed to the crime of fornication with *Wesley A. Flamme* on May 22, 1919, in the belief that she would not be prosecuted for the offense she confessed. *Flamme* was arrested and a preliminary examination was held in the police court of Richland Center, in which *Mabel Banker* testified to the statement contained in her signed confession previously made to the district attorney. On cross-examination she testified that she did not make this statement voluntarily, but because she thought she had to. Counsel for defendant *Flamme* asked the court to instruct the witness that she could not be compelled to testify to anything that would incriminate her, which the court did not do. *Wesley Flamme* was held for trial in the county court of Richland county on a charge of adultery. At the succeeding June term an affidavit of prejudice was filed on the first day of the term, and the case was transmitted to the circuit court.

On the first day of the term of the county court *Mabel Banker* did not appear, and upon application of the district attorney a bench warrant was issued by the county court and the sheriff brought her into court, where she was placed under bonds to appear at the next term of the circuit court as

a witness for the state against *Wesley Flamme.* At that time she told the court that the statement she made to the district attorney was not true. On July 22, 1919, a warrant was issued charging *Mabel Banker* with having committed the crime of fornication with *Wesley A. Flamme* on May 22, 1919. A preliminary hearing was held before the police justice on July 23, 1919, in which the sheriff and one Robinson testified to the testimony given by *Mabel Banker* on the preliminary examination of *Wesley A. Flamme. Mabel Banker* was held for trial in the county court at the next regular term. The county court transmitted the case to the circuit court for Richland county, and at the September term the district attorney filed an information in which he joined both defendants, charging *Wesley A. Flamme* with adultery and *Mabel Banker* with fornication. A motion for separate trials for the defendants was denied.

Upon the trial of the case the plaintiff repudiated her statement to the district attorney, denying any such relations with *Wesley Flamme* on May 22, 1919, or at any other time. The written statement made by her to the district attorney was never offered or received in evidence, but was used by the district attorney in his examination of witnesses during the trial, and after the jury had retired to deliberate upon their verdict the court permitted the written confession of *Mabel Banker* to be taken to the jury room and considered by the jury.

The jury returned a verdict finding the defendant *Wesley A. Flamme* guilty of adultery, and the defendant *Mabel Banker* guilty of the crime of fornication. A motion for a new trial was denied, sentence being suspended pending a hearing in this court. The case is brought here on a writ of error.

L. H. Bancroft of Richland Center, for the plaintiffs in error.

For the defendant in error there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney

general, and *E. E. Brindley,* district attorney of Richland county; and the cause was argued orally by *Mr. Brindley* and *Mr. Messerschmidt.*

SIEBECKER, J. The main questions presented for decision are whether or not the confession of *Mabel Banker* to the district attorney was competent evidence, and whether the court erred in refusing the defendants' requests for separate trials.

The facts concerning the confession made to the district attorney by *Mabel Banker* disclose that she at that time was nineteen years of age; that she resided with her mother at their home in Richland Center; that the sheriff called at their house and asked her to accompany him to the office of the district attorney in the courthouse; that her mother went with her, and that they both believed *Mabel Banker* was under the command of the sheriff to do this. When they arrived at the courthouse the mother was not permitted to be in the office room of the district attorney with the daughter; the district attorney and sheriff were the only persons present in the room with her, and she was detained in this room for about an hour and a half while being questioned concerning her conduct as to having had sexual intercourse with *Flamme.* She testifies that she informed them that she had had no such relations with *Flamme,* but under their influence she was persuaded to confess having committed this offense with *Flamme,* and made this confession upon the assurance then made to her that such statement would shield her from being prosecuted for such an offense. It appears that the district attorney prepared the written statement of her confession and presented it to her for her signature; that after being informed of its contents and a correction made of a misstatement in it, she then signed it, and was sworn by the district attorney as to its truthfulness.

The testimony of the district attorney and sheriff is to the effect that the sheriff called upon her, as she declares, but that she went freely and voluntarily to the district attorney's office with the sheriff upon his invitation; that while there she was questioned by the district attorney concerning her conduct while on trips with *Flamme* from Richland Center and in the city; that she was not advised of her privilege that she was not required to incriminate herself before them; and that though she at first denied criminal relations with *Flamme,* she finally freely admitted her transgressions and consented to make a sworn written statement, and that she signed and swore to this statement voluntarily before leaving the office of the district attorney.

The facts and circumstances surrounding the securing of the confession as disclosed by the record indicate with reasonable certainty that *Mabel Banker* did not act freely and voluntarily in her disclosures made to the district attorney. A study of the record compels the conviction that she did not volunteer to make a confession of her criminal conduct. Her entire conduct indicates that she made this written statement under conditions and influences which coerced her to do this against her will. While we are satisfied that the officers made no promise of immunity from prosecution if she confessed, yet it is apparent that she did not act voluntarily in the matter. Intimations of disfavor toward her by the officers having authority to prosecute her for the offense under consideration are sufficient to exclude the conclusion that her confession was a free and voluntary act. The whole transaction, from the time the sheriff called at her home and asked her to go with him to the district attorney's office to the time she affixed her signature to the typewritten statement under oath before leaving the office, shows she was placed in circumstances that operated to coerce her and deprive her of free and voluntary action in respect to the inquiries put to her. The situation presented

by the record is aptly characterized in an early case in this court in speaking of the effect on a person in such a situation:

"He may be surrounded by those whose suspicions are excited to a degree amounting to accusation, and be fully aware that his escape would be impossible if attempted, and be pressed with questions in such manner and under such circumstances as to render his answers compulsory. But this would be in the nature of duress." *Schoeffler v. State,* 3 Wis. 823, 844.

Under such circumstances the statements are not voluntary, and are incompetent as evidence against the party accused. *Bianchi v. State,* 169 Wis. 75, 171 N. W. 639.

It must be held that *Mabel Banker's* confession was incompetent evidence and erroneously received in evidence. The argument that her repetition of the confession in police court on the preliminary examination of *Flamme* was a voluntary statement is not substantiated by the record. The facts and circumstances show that she obviously acted upon the belief that her written and sworn confession made to the district attorney compelled her to repeat it on the witness stand before the police justice. This left her testimony on that occasion unpurged of the duress that attended it from the beginning.

It is contended that the court erred in refusing to grant the defendants' requests for separate trials. The question of granting defendants in criminal cases separate trials, when jointly informed against for offenses arising out of the same transaction, is largely within the discretion of the trial court. *Mayfield v. State,* 142 Wis. 661, 126 N. W. 15.

The instant case presents the peculiar situation that the offenses charged against the defendants, though different in degree, necessarily arise out of the same criminal act. The court in receiving the confession of *Mabel Banker* properly held it was not competent evidence against *Flamme,* and so instructed the jury. Yet in the very nature of the evidence,

if it was considered proof of the guilt of *Mabel Banker* of the offense charged against her, then it inevitably followed that it proved the offense charged against *Flamme*. We can conceive of no mental process by which the jurors could do otherwise than so regard it, and thus necessarily prove the offense of *Flamme*. This clearly presents a case where the confession of a defendant, admissible against her but not against a codefendant, must inevitably operate to the prejudice of the latter defendant's rights. Under these conditions a denial to grant separate trials is clearly an abuse of discretion.

The district attorney's statement in his closing argument, "I knew of these acts of *Flamme* and his riding around town with these young people and his trips to Muscoda," is objectionable as a statement of evidentiary facts not permitted by counsel as argument to the jury. The court upon objection should have cautioned the jury not to consider such statement as evidence in their deliberations on the case.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial with directions to grant the defendants' requests for separate trials.

WILCZYNSKI, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

January 15—June 1, 1920.

Negligence: Proximate cause: Improper installation of electric motor: Ineffectual attempt to repair.

In an action for the death of an employee of one using an electric motor, the negligence of the defendant electric company in failing to properly repair and install the motor was not the proximate cause of death by electric shock, where, after the installing and attempted repair by defendant, an employee of decedent's employer attempted to make such repairs as would render the apparatus safe, both decedent and his employer having knowledge that defendant had not properly installed and repaired the motor.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Anton Karbowski, while at work in the yard of the Kanawha Fuel Company on the 31st day of July, 1916, was instantly killed by an electric shock. The widow claimed compensation under the workmen's compensation act. The making of the claim operated, under the provisions of that act, to assign to the Kanawha Fuel Company her claim against the defendant company, she claiming that the death of her husband was due to the negligence of the defendant. The Kanawha Fuel Company then re-assigned the cause of action to the widow. As plaintiff in this action, she having remarried, she claims under and by virtue of such assignment.

At the time of his injury Karbowski was engaged in handling a coal bucket which was being used to unload coke from a gondola car. The bucket was operated by means of a fifty-two horse-power electric motor geared to a drum, with which it was connected by steel cables. The motor was on a wooden structure and not metallically connected with the ground, but there was a complete metallic connection between the frame of the motor and the bucket, by

means of the gears, the drum, and the steel cables; and if a person touched the clam shell while standing on the ground, or metallically connected therewith, his body would complete the electrical circuit between the frame of the motor and the ground.

The Fuel Company employed the defendant company to install the electrical apparatus used in unloading this car. The particular motor in question gave some trouble during the week preceding the accident, and the defendant took a part thereof to its shop, repaired it, and it was replaced by the defendant on the day of the accident. The motor was then started, and appeared to operate properly. A few minutes later, and before the employees of the defendant had left the premises, Karbowski, who was handling the bucket on the car of coke, complained of receiving an electric shock. The defendant's employee upon being notified of this fact discovered that there was a presence of electricity on the motor frame, which he correctly thought to be due to static electricity. He sought to remedy this by placing a wire from the motor frame to the other machinery, and, after having installed the wire, left the premises. In the afternoon about 1:30 Karbowski again complained of the presence of electricity. Bartls, one of the defendant company's employees, picked up a shovel, grasped the wooden handle with one hand, and in Karbowski's presence touched the end of the shovel to the clam shell. He received so severe a shock that he was thrown some distance, and the shock was so great that he could not touch the bucket at all.

Bartls and Andweg, the operator of the motor, neither of whom knew anything about electrical appliances, then looked the motor over to see where the trouble lay. They found the short wire installed by the defendant's employee, and, considering it to be useless, as in fact it was, removed it. They discovered that the motor frame was not grounded. At a previous time, when engaged in operating the same motor, Andweg had observed that there was a ground

wire running from the motor. He then procured from the store room a piece of wire and attached one end of it to the frame of the motor and the other end to the head of an iron rod some two feet long, and shoved the rod into the ground its full length. The wire was a No. 12 iron wire. Andweg then started the motor again, and Bartls, who was the foreman, touched the clam shell and received no shock. The work of unloading the car then continued, Bartls handling the bucket in place of Karbowski, until about 4 o'clock. Bartls then turned the work over to Karbowski while he made a temporary tightening of the friction on the hoisting drum. Karbowski grasped the bucket as it was raised out of the car, and fell over dead from an electric shock.

The explanation given by an electrical expert is this: The electric power for operating the motor was furnished over a three-phase system consisting of three wires called phase wires, all of which carried electric current. The normal voltage between any one wire and the ground was about 240 volts, but the voltage from one wire to another wire was about 480 to 530 volts. A single connection from one phase wire to the ground would not result in any escape of current in excess of 240 volts, because there would be no complete circuit from one phase wire to another. Such a circuit would be completed, however, if two phase wires became simultaneously grounded, because the full current of 530 volts would then flow from one wire through the ground and back to the other wire. Due to some defect in the motor operating the clam shell, resulting, as the jury found, from the defendant's negligence, the frame of the motor was permitted to become electrified. A properly installed ground wire from the frame of the motor to the ground would have carried off any current so escaping to the frame of the motor. There being no ground wire in this case up to the time that Andweg installed his wire, the only path to the ground was out over the hoisting cables to the clam shell and through the body of any person who might touch the clam shell while connected with the ground.

But such current, escaping in that manner, would not be the full 530 volts, unless some phase wire other than the one that was grounded in the motor became grounded at another point. Until that time the only current that would flow through the frame of the motor, through the clam shell and the man's body, would consist of what is known as static electricity, which is not apt to be dangerous.

It is conceded that the shock which Bartls received about 1:30 could not have been due to static electricity. The peculiar manifestations at these specified times were accounted for upon the theory that at the moment these shocks were received there occurred a ground somewhere else on the system, affecting a different phase wire than the one that was grounded in the clam-shell motor, so that the man's body completed a circuit for the full 530 volts of dynamic current. There was evidence tending to show that the second ground occurred in the yards of another fuel company which at the same time was having trouble with a grounded motor.

It is conceded that the wire which Andweg attached to the motor frame and grounded was totally insufficient to conduct a current such as reached the machinery at the times in question, it having only about one twelfth of the carrying capacity of the wiring required under the rules of the industrial commission.

The jury found that the defendant was negligent; that the installation of the inadequate wire did not proximately contribute to Karbowski's death; that the installation of the ground wire did not make the place of employment unsafe; that the Kanawha Fuel Company did not fail to do everything reasonably necessary to protect the life, health, and safety of its employees after learning that electric shocks were felt at the clam shell; and assessed the damages at $5,250.

There were the usual motions, and the plaintiff had judgment upon the verdict, from which the defendant appeals.

For the appellant there were briefs by *Van Dyke, Shaw,*

Muskat & Van Dyke, and oral argument by *Ralph M. Hoyt,* all of Milwaukee.

H. M. Burns and *E. L. McIntyre,* both of Milwaukee, for the respondent.

ROSENBERRY, J. Upon this appeal the defendant contends that the plaintiff cannot recover because her assignor, the Kanawha Fuel Company, was guilty of contributory negligence as a matter of law which proximately caused Karbowski's injury; that such contributory negligence of the Kanawha Company bars plaintiff's action, since she sues as assignee of that company; and that the defendant's negligence was not a proximate cause of Karbowski's death.

In view of the conclusion which we have reached we shall not treat the questions raised under the first two assignments of error. If the negligence of the defendant company was not the proximate cause of Karbowski's death, the defendant cannot be held liable in any event. It appears practically without dispute that the negligence of the defendant company consisted in its failure to properly repair and install the motor, as it was bound to do under its contract with the Fuel Company, and that such negligence resulted in the motor frame and the apparatus controlling the bucket becoming heavily charged with dynamic electricity. It is further undisputed that the Fuel Company through its employees and the deceased Karbowski were fully apprised of the danger in using the motor, and the apparatus controlling the bucket, in that condition. The continued use of the apparatus in its then known condition would have constituted contributory negligence as a matter of law. The deceased saw Bartls thrown several feet by coming in contact with the bucket. In the absence of some intervening act, no sane man would have continued to use the apparatus. The Fuel Company by its employees assumed and attempted to make such a repair as would render the apparatus reasonably safe. Its failure to do this was the immediate and proximate cause of decedent's injury.

In a physical sense it may be said that the negligence of the defendant contributed to the injury, for had not the motor been insufficiently repaired and improperly installed the dynamic current would not have been present in sufficient amount to be dangerous. In order to make defendant liable its negligence must not have been only a cause, but a proximate cause—that is, an immediate cause—of Karbowski's death.

This court has said:

"Whenever a new cause [independent intervening circumstance] intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action." *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271.

The circumstances in this case show that the act of the Fuel Company's employees answers every call of the definition of an intervening cause, which renders the negligence of the defendant company so remote that it cannot be said to be a proximate cause of Karbowski's injury. The defendant company could not reasonably anticipate that workmen who had discovered the presence of a powerful dynamic electrical current which appeared to them to be so dangerous that they desisted from all work, would make a repair, especially when, as here, they knew absolutely nothing about electricity or electric apparatus. *Horton v. Forest City Tel. Co.* 146 N. C. 429, 59 S. E. 1022. In *Kumba v. Gilham,* 103 Wis. 312, 79 N. W. 325, it was held that one is not required to anticipate the improper conduct of a third party. In this case the attempted repair was not only improperly made, but done in direct violation of regulations made pursuant to statute. The ineffectual attempt of the Fuel Company's employees to make the repair had the effect of assuring decedent that the place was reasonably safe, and he re-

sumed his work relying upon that assurance. Karbowski undoubtedly believed that by reason of the attempted repair the element of danger was entirely removed and that the place in which he worked was reasonably safe. He had full knowledge of the effects of the defendant's failure to perform its duty. The thing upon which he relied in again entering the danger zone was the act of the Fuel Company. The negligent act of the Fuel Company's employees, and so the act of the company, was therefore the immediate and proximate cause of his death, rather than the negligence of the defendant, which by the intervening act of the Fuel Company had become remote and not a proximate cause. *Seaver v. Union,* 113 Wis. 322, 89 N. W. 163.

We are of the opinion, therefore, that the trial court was in error in awarding judgment against the defendant.

By the Court.—Judgment reversed.

SIEBECKER, VINJE, and OWEN, JJ., dissent.

PFEFFER and others, Appellants, vs. CITY OF MILWAUKEE and another, Respondents.

February 10—June 1, 1920.

Food: Municipal ordinance requiring pasteurization of milk: Validity: Evidence: Judicial notice of methods of pasteurizing milk: Injunction: Motion to dissolve: Effect.

1. A motion to dissolve a temporary injunction challenges the sufficiency of the complaint.
2. Scientific knowledge concerning milk as a food and the best method of pasteurizing is so generally understood and known that courts will take judicial notice of these facts.
3. An ordinance of the city of Milwaukee requiring milk sold in the city, except certified milk and tested milk, to be pasteurized by either the "holding" or the "flash" system, is a regulation for the protection of the public health within the discretionary power of the common council.

ESCHWEILER, J., dissents.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The appeal is from an order dissolving a temporary injunction.

This action was brought by the plaintiffs to declare null and void an ordinance of the city of *Milwaukee.* Plaintiffs are milk dealers, some of whom have been in that business for many years before the passage of the ordinance in question. They claim that their business is being injured by secs. 787.5 to 787.9 and 787.91 of the Milwaukee ordinances, which provide that all milk sold in the city of *Milwaukee* must be either certified milk, milk which has been passed by the tuberculin test, or milk pasteurized by either the "holding" or the "flash" method.

The defendants did not answer, but moved upon the complaint and the temporary injunctional order which the plaintiffs had obtained for a dissolution of this temporary injunction. The court dissolved the temporary injunctional order and held that the complaint did not state a cause of action, upon the ground that the ordinance is valid. This is an appeal from such order.

Wm. A. Schroeder and *Horace B. Walmsley,* both of Milwaukee, for the appellants.

For the respondents there was a brief by *Clifton Williams,* city attorney, and *Charles W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

SIEBECKER, J. The ordinance in question, as declared in its title, pertains to "The pasteurization of milk," and adds to the Milwaukee Code of Ordinances of 1914 six new sections. Sec. 787.5 provides:

"All milk hereafter sold in the city of *Milwaukee,* except *certified* milk and inspected milk, shall be pasteurized by either the holding or the flash system."

This section requires that an automatic heat-recording device, approved by the health officer, must be used to record

the heat of the milk and the length of time it is held at the highest temperature. Sec. 787.6 provides:

"All milk pasteurized . . . by the holding system shall be heated to a temperature of not less than one hundred forty-five degrees Fahrenheit and shall be continuously held at that temperature for thirty minutes and shall then be promptly and quickly cooled to a temperature not exceeding fifty degrees Fahrenheit."

The milk subject to the flash system shall be likewise treated except that it shall be heated to 165 degrees and held there for one and one-half minutes and then cooled as above prescribed. Sec. 787.8 provides that milk so pasteurized "shall not be reheated or repasteurized for the purpose of sale as food for human beings." Other sections define certified and inspected milk and prescribe penalties for the violation of any provision of the ordinance.

The motion to dissolve the temporary injunction challenges the sufficiency of the complaint. *Harley v. Lindemann,* 129 Wis. 514, 109 N. W. 570. The injunctional order procured from the court commissioner was dissolved by the circuit court upon the ground that the city ordinance providing for the pasteurization of milk is a valid regulation and hence the complaint states no cause of action. The plaintiffs claim that this ruling is erroneous upon the grounds that the prescribed pasteurization does not promote the public health, because the milk subjected to it is deteriorated as a food product, that it does not destroy pathogenic bacteria in the milk, that it in no way tends to make or preserve the milk as a more healthful article of food, and that the milk subjected to this process of pasteurization is not as wholesome, healthful, and as good an article of food as milk in the natural state drawn from cows. The questions raised by these contentions involve the inquiry of scientific facts concerning the pasteurization of milk. The importance of securing a supply of pure and wholesome milk for human consumption is universally acknowledged.

State ex rel. Nowotny v. Milwaukee, 140 Wis. 38, 121 N. W. 658.

Public health demands that milk and all milk products should be pure and wholesome. It is also common knowledge that milk containing deleterious organisms is an unsuitable article of food. Milk is known to be a product easily infected with germ life and to require special attention and treatment in its production and distribution for consumption as an article of food. Scientific knowledge concerning these facts and the best method of pasteurizing milk for human use in course of production and distribution as a pure and wholesome food is so generally understood and known that courts take judicial notice of these facts. It is a generally accepted fact that when milk is heated to a temperature of 145 degrees Fahrenheit and sustained at that point for thirty minutes, the disease-causing germs are destroyed. Such pasteurization may be performed at the home or at the distributing stations. Under these circumstances and conditions of the milk business it was proper for the common council of the city of *Milwaukee* to determine in its legislative function what means and methods were best adapted to accomplish the object of supplying the people of the city of *Milwaukee* with wholesome milk. The objection to the method adopted by the common council for the pasteurization of the city's milk supply cannot avail in this case for holding the ordinance invalid, because that subject is one within the legislative power of the common council under the powers conferred by the city charter. The system of pasteurization provided for in the ordinance is one in common use and hence is not subject to the objection that it is an untried and unpracticed scheme as alleged by the complainants. The provisions for supplying certified and inspected milk require of dealers what is appropriate to furnish a wholesome and pure product in the conduct of the milk trade. In the light of these known facts and practices regarding the pasteurization treatment of milk to destroy

pathogenic germs and the systems of inspection and certification to make it a healthful food and preserve it in that state in the process of distribution among the people of the city, it cannot be said that the common council of the city have provided unreasonable and oppressive regulations for the promotion of the public health of the people, nor that the powers conferred on the health officer for the enforcement of the ordinance are unreasonable or prejudicial to the private rights and property interests of the plaintiffs and others similarly situated. *State ex rel. Nowotny v. Milwaukee,* 140 Wis. 38, 121 N. W. 658; *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376, 1136, 1139; *Le Feber v. West Allis,* 119 Wis. 608, 97 N. W. 203; *Adams v. Milwaukee,* 144 Wis. 371, 129 N. W. 518.

It is considered that the ordinance is a proper regulation of the milk supply of the city and that it is an appropriate and valid regulation for the protection of the people's health.

By the Court.—The order appealed from is affirmed.

ESCHWEILER, J. (*dissenting*). The majority opinion holds as a matter of law that pasteurization of milk is a provision that may lawfully be required within a proper exercise of the legislative discretion vested in the common council. I think, however, that such was not the only question involved under the allegations of the complaint, and that a person so challenging such an ordinance should have an opportunity to do so upon due hearing and with the opportunity to offer testimony from those who have acquired expert knowledge in such particular field of scientific knowledge.

KUPSICK, Appellant, vs. DIESTELHORST, Executor, Respondent.

February 11—June 1, 1920.

Wills: Bequest as payment of debt: Presumption: Ante-nuptial contract: Appeal: Weight accorded finding of trial court.

1. Where a bequest is made in a will equal to or greater in amount than a debt owing from the testator to a legatee, the presumption, in the absence of other facts and circumstances showing a contrary intent, is that the bequest is in payment of the debt, especially where the time and manner of payment are the same, although such presumption is readily rebuttable by facts and circumstances showing a different intent.
2. A finding by the trial court in an action to construe a will, that testator intended that a legacy was in payment of a debt of testator, will not be reversed unless the supreme court is satisfied that it was clearly wrong.
3. Where a widower in an ante-nuptial contract agreed to pay his intended wife $3,000 on his death, and died possessing an estate of $32,000 which had been accumulated largely by the help of one of his four sons, with all of whom he was on good terms, the trial court properly found that a bequest of $3,000 to the widow was in payment of the debt created by the ante-nuptial agreement, decedent also bequeathing to the widow all his furniture and one fifth of the residuary estate.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to construe a will. In 1904 the testator, then a widower, made an ante-nuptial agreement with plaintiff whereby, in consideration of their intended marriage and her release of dower and all claims against his estate, he agreed to pay her $3,000 after his death. They married and lived as husband and wife till his death in December, 1915. In June, 1915, he made his will wherein he gave his wife all his household furniture and $3,000. She was also made a residuary legatee of one fifth of the residue of his estate. Bequests were made to his three sons and his daughter-in-law. Plaintiff claimed payment out of the estate of the $3,000 provided for in the ante-nuptial agree-

ment and also of the bequest of $3,000 contained in the will. The executor claimed she was entitled to only one of such sums, because the bequest was in lieu or payment of the ante-nuptial debt and not an additional bequest. The circuit court sustained the claim of the executor, and from a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Bowler & Bowler* of Sheboygan, and oral argument by *T. M. Bowler.*

For the respondent there was a brief by *Prescott & Gillen* of Sheboygan, and oral argument by *A. C. Prescott.*

VINJE, J. The question for decision is whether the bequest in the will of $3,000 is in payment of the debt created by the ante-nuptial agreement or is an additional gift. The general rule of the English and American cases is that where a bequest is made in a will of an amount equal to or greater than a debt owing from the testator to the legatee, the presumption, in the absence of other facts and circumstances showing a contrary intent, is that the bequest in the will is in payment of the debt, especially so where the time and manner of payment are the same. See note to *Fidelity Trust Co. v. Martin* (158 Ky. 522, 165 S. W. 665) L. R. A. 1915B, 1156, where the authorities are collected. The presumption raised by the rule, however, is readily rebuttable by facts or circumstances showing a different intent. This presumption was recognized by our court in *Graves v. Mitchell,* 90 Wis. 306, 63 N. W. 271, and that case controls this unless a different intention can be gathered from the facts and circumstances surrounding the testator. The trial court negatived a different intent, and in order to reverse such finding this court must be satisfied that it was clearly wrong. When the ante-nuptial agreement was made testator was a widower. Four sons by his first marriage survived him, with all of whom he was on good terms. Plaintiff was a divorced woman with children who formed part of the family after her marriage to testator. She remarried

again before the final settlement of the estate. The domestic life of testator and plaintiff was neither specially happy nor specially inharmonious. The estate of about $32,000 was accumulated almost entirely before testator married plaintiff and largely with the help of his son John, who had assisted his father in his business for the last twenty-two years. Under the will the widow received more than any of the children except John, excluding the bequest as an additional gift. If that were added to her share she would have nearly as much as the son, who had largely produced the estate. Under such circumstances we think the trial court correctly found that it was not the intent of the testator to make an additional bequest of $3,000 to the widow, but that the bequest was in payment of the debt created by the ante-nuptial agreement. The identities of amount, time, and manner of payment, and the circumstances surrounding the testator, all indicate the trial court reached the right result.

By the Court.—Judgment affirmed.

STATE EX REL. KNUTSON, Appellant, vs. JOHNSON, Respondent.

March 9—June 1, 1920.

Sheriffs: Eligibility of one appointed for unexpired term to succeed himself: Vacancy in office upon election of ineligible person: Quo warranto: Costs when neither party is entitled to office.

1. Under sec. 4, art. VI, Const., providing that sheriffs shall be ineligible to office for two years next after termination of their offices, that all vacancies shall be filled by appointment, and that the person appointed shall hold only for the unexpired portion of the term, one appointed to fill a vacancy in the office of sheriff is ineligible to succeed himself, as he holds the office for all purposes as completely and fully as did the elected sheriff.
2. Where one appointed to fill a vacancy in the office of sheriff was elected to such office for the succeeding term, although he was ineligible under sec. 4, art. VI, Const., there was a

vacancy in the office after the expiration of the appointive term. Sub. (6), sec. 17.03, Stats., declaring that a public office becomes vacant upon the decision of a competent tribunal declaring void the election or appointment of one claiming it, also applies, and in this case there is a vacancy authorizing an appointment.

3. Where at the time an action to test defendant's right to the office of sheriff was begun he was the *de jure* sheriff, and relator was not entitled to the office, defendant having been elected to fill the same notwithstanding his ineligibility, on appeal from a judgment dismissing the action neither party will be allowed costs other than that the defendant, who asserted the validity of his election, should be required to pay the costs of the clerk of the appellate court, those in the court below to remain as there fixed.

APPEAL from a judgment of the circuit court for Barron county: W. R. FOLEY, Circuit Judge. *Affirmed.*

In November or December, 1917, the defendant was appointed by the governor to fill an unexpired term which was to end the first Monday of January, 1919, as sheriff of Barron county, and accepted and qualified as such and has continued to act as sheriff since that time.

In the fall of 1918 he was a candidate for the office of sheriff in the primary election and also in the general election for the term commencing January 6, 1919, received a majority of the votes, was declared elected, and subsequently in form qualified.

This action was brought in February, 1919, to have determined whether the defendant was eligible for election in November, 1918, to the term so commencing on January 6, 1919.

The trial court held that the defendant, having been appointed merely to the term expiring January 6, 1919, was not disqualified under the constitution from being lawfully elected for the new term commencing on the same day, and directed judgment in favor of the defendant accordingly.

From the judgment dismissing the action plaintiff has appealed.

Spencer Haven of Hudson, for the appellant.

For the respondent there was a brief by *Clarence C. Coe* of Barron, attorney, and *Crownhart & Wylie* of Madison, of counsel, and oral argument by *Fred M. Wylie.*

ESCHWEILER, J. Prior to 1882, sec. 4, art. VI, Const., provided, as to sheriffs and certain other county officers, that vacancies occurring in their respective offices should be filled by election. By the construction given to that section by the decision in *Attorney General ex rel. Schantz v. Brunst,* 3 Wis. 787, upon such an election the officer held for a full term of two years from the time of such election or qualification instead of for the balance of the term existing at the time the vacancy occurred. The evident interference with the general plan of uniformity as to the terms of county officers resulting therefrom undoubtedly caused the substantial change that was effected by the constitutional amendments which went into effect in November, 1882, making the said section of art. VI, Const., since then and now to read as follows:

"*County officers; election, terms and removal of.* Section 4. Sheriffs, coroners, registers of deeds, district attorneys, and all other county officers except judicial officers, shall be chosen by the electors of the respective counties once in every two years. *Sheriffs* shall hold no other office, *and be ineligible for two years next succeeding the termination of their offices;* they may be required by law to renew their security from time to time, and in default of giving such new security their office shall be deemed vacant; but the county shall never be made responsible for the acts of the sheriff. The governor may remove any officer in this section mentioned, giving to such a copy of the charges against him and an opportunity of being heard in his defense. *All vacancies shall be filled by appointment, and the person appointed to fill a vacancy shall hold only for the unexpired portion of the term to which he shall be appointed* and until his successor shall be elected and qualified."

The particular phrase of that section, "sheriffs shall hold no other office, and be ineligible for two years next succeed-

ing the termination of their offices," here under consideration, is not found in the constitutions of other states, has not heretofore been construed by this court, and there are therefore no decisions found that are helpful in disposing of this matter.

When such an appointment is made as was in this case, the person so appointed from then on holds the office of sheriff for all purposes as completely and fully as did the elected sheriff to succeed whom such appointment was made. By such appointment it becomes the appointee's office, and the expiration of the two-year period succeeding the election of the predecessor is as much the termination of the appointee's office as it would have been of the official elected had he continued therein. No other term than such particular two-year term is recognized in the constitution. It is the one and same term no matter who the incumbent.

We therefore hold that the ineligibility declared in the language just above quoted is upon him who is, at the time of the general election just preceding the new term, filling the office of sheriff for the then present term, whether he has been elected to such specific term or appointed to fill out and complete such term.

The defendant then being to all intents and purposes sheriff of Barron county at the time of the general election in November, 1918, was by virtue of the said provision of the constitution ineligible for election to succession as sheriff at the new term commencing in January, 1919. He being ineligible, his certificate of election to such office was therefore void and he could not legally qualify as such sheriff for such new term.

It was properly conceded on the argument, and it is now so held, that the defendant is nevertheless sheriff *de jure* while exercising the functions of sheriff since the time of and by virtue of his appointment in the fall of 1917 for the then unexpired term in that office, and his acts as such cannot, as the record stands before us, be questioned.

It appearing that the defendant was not and could not

be legally elected in November, 1918, for the new term commencing January, 1919, there was no person qualified by law to assume the functions of sheriff for the new term commencing in January, 1919, and it must therefore necessarily be held that thereupon there was a vacancy in that office, so far as such new term was concerned, immediately after the commencement of such new term.

The very nature of such a constitutional provision as we have here which so definitely fixes the term of office of sheriff for the period intervening between two annual elections, and which term can be neither extended nor shortened, makes the expiration of such a term of such a certain event to occur at a known time that it of itself creates necessarily a vacancy in such office in the event there is no one at the commencement of such new term who is then and there lawfully entitled to take for such new term. This would seem to be necessarily the rule irrespective of any precise legislative declaration to that effect. *People ex rel. Bast v. Voorhis,* 227 N. Y. 167, 125 N. E. 86.

In this particular case it may also well be determined that there is now a vacancy in the term of office of sheriff of Barron county which commenced January 6, 1919, under the terms of sub. (6), sec. 17.03, Stats., declaring how vacancies in public offices shall be caused, and specifying in said subdivision that a public office such as this shall become vacant upon the decision of a competent tribunal declaring void the election or appointment of an officer claiming to hold such office. The effect of this decision being to declare that defendant's claimed election in November, 1918, and subsequent alleged qualification thereupon for such term commencing January, 1919, were void, it follows therefrom that there is such a vacancy in the office of sheriff of Barron county for the term commencing the first Monday of January, 1919, as authorizes an appointment to fill such vacancy for the unexpired portion of such term, pursuant to the last clause of the above quoted sec. 4, art. VI, Const.

It now having been held that the defendant was a *de jure*

sheriff and to that extent lawfully in office as such at the time of the bringing of this action, the plaintiff has therefore failed in his contention that the defendant must be held to be an usurper or required to return to Barron county the fees collected by him since January 5, 1919, as prayed for in the complaint. The defendant, on the other hand, has likewise failed to support the defense he asserted of a valid election and qualification for the new term. We therefore deem it proper to deny to either party the costs of this court other than that the defendant shall pay the costs of the clerk here, costs in the court below to remain as there fixed.

The judgment of dismissal of plaintiff's complaint in the court below must therefore necessarily be affirmed, but on grounds contrary to those upon which the trial court predicated such judgment.

By the Court.—Judgment affirmed, but on the grounds stated in this opinion.

NORTHWESTERN BRIDGE & IRON COMPANY, Respondent, vs. MARYLAND CASUALTY COMPANY, Appellant.

March 12—June 1, 1920.

Municipal corporations: Contracts: Assignment by principal contractor: Assignee as subcontractor: Action on surety bond of principal contractor: Waiver of rights.

1. Where a city refused to consent to the substitution of a third party as principal contractor, the third party's agreement with the principal contractor to complete the contract with the city was merely an agreement to furnish labor and material still due from the contractor.
2. Where the principal contractor's bond was conditioned on his performance of his contract, which provided that he should furnish satisfactory evidence "that all claims of all persons who have been employed upon the work, or who have furnished materials for the work under his contract and according to these specifications, have been fully settled," the contractor's surety was liable to unpaid subcontractors and materialmen, the words "fully settled" meaning paid and discharged.

3. The subcontractor's action against the city and the principal contractor to determine the amount due and the subsequent application of moneys in the hands of the city under the mandate of the judgment in part payment of the indebtedness to the subcontractor, do not constitute a waiver and satisfaction of all rights under the contract, precluding the subcontractor from suing the contractor's surety.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Indemnity. On February 15, 1917, the city of Waukesha, hereafter called the city, entered into a contract with C. H. Phillips, hereafter referred to as the contractor, for the construction of a certain septic tank and appurtenances thereto. The defendant executed a bond in the penal sum of $8,546, conditioned that the contractor would faithfully perform the terms of the contract and specifications on his part to be performed. The following clause was a part of the contract:

"*Claims.* Before final settlement will be made, the contractor must furnish the city satisfactory evidence that all claims of all persons who have been employed upon the work, or who have furnished materials for the work under his contract and according to these specifications, have been fully settled."

In the following June work on the contract came to a standstill, and the contractor entered into an arrangement with the plaintiff as follows:

"This agreement, entered into this 21st day of June, 1917, by and between the *Northwestern Bridge & Iron Company* of Milwaukee and C. H. Phillips of Waupaca, Wisconsin, whereby the *Northwestern Bridge & Iron Company* agrees to furnish all labor, materials, equipment, etc., necessary to complete the sewerage disposal plant as shown on drawings numbered 1 to 4 and specifications attached, as prepared by W. G. Kirchoffer, consulting engineer, at Madison. This work to consist of completing the work already started by Mr. Phillips. We to pay all material bills and labor bills from this day on that may be required to complete the entire work. It is understood and agreed that any and all

equipment now on the premises are to remain there and to be at our service without any compensation for the use until the work is completed or at such a time as the same may be released by the *Northwestern Bridge & Iron Company*. Any equipment necessary that we have not at our own disposal and which may have to be rented in order to complete this work will be charged into the cost of this job at whatever rental cost plus transportation of same as cost to us.

"It is further agreed that in consideration of the above obligation to be carried out and as carried out by the *Northwestern Bridge & Iron Company* that C. H. Phillips shall pay to the *Northwestern Bridge & Iron Company* the sum of the actual cost of this work plus the liability insurance of the men, transportation of the men and fifteen per cent. as profit to reimburse us for our time and energy required to complete this work. This money to be paid to us on monthly estimates which are to be in accordance with your contract with the city of Waukesha and which also becomes part of this contract. This money to be paid to us through Alfred Miller, who is to act as trustee, and which aggregate approximately $7,600, or that portion thereof as to satisfy our claim.

"Should this money be insufficient to pay the total amount of our claim, it is further agreed that Mr. Phillips will make up this deficiency and in lieu thereof grant the *Northwestern Bridge & Iron Company* the right of any and all equipment now on the work to safeguard us against such a deficiency."

The Alfred Miller referred to in the contract between the plaintiff and the contractor was the local agent of the defendant, and as the work progressed moneys due under the contract were paid to Miller and by him turned over to the plaintiff. An effort was made to have the city consent to the substitution of the plaintiff as contractor in place of Phillips. To this arrangement the city refused to consent, and there was in fact no substitution. The work was completed by the plaintiff at a cost greatly exceeding the remainder due upon the contract. After the completion of the contract the plaintiff brought suit against the city and

the contractor. Judgment was entered directing the city to apply the moneys due on the contract to the satisfaction of plaintiff's claim, after which there remained a balance due from the contractor to the plaintiff of $11,612.64, for which amount the plaintiff took judgment against the contractor. Demand was made upon the bonding company for payment. The demand was refused, and thereupon this suit was begun by the plaintiff against the defendant upon the theory that the bond was a contract for the benefit of third parties. There was judgment for the plaintiff against the defendant for the sum of $8,546, the amount of the bond, and costs, from which the defendant appeals.

For the appellant there were briefs signed by *Jackson B. Kemper* of Milwaukee, of counsel, and oral argument by *Mr. Kemper.*

For the respondent there was a brief by *Lawrence A. Olwell* and *Bernard V. Brady,* both of Milwaukee, and oral argument by *Mr. Brady.*

The following opinion was filed April 6, 1920:

ROSENBERRY, J. The defendant makes three principal contentions: First, that the plaintiff is an assignee and stands in the shoes of Phillips and has no greater right to recover from the surety on the bond than Phillips, the contractor, would have had. Second, that neither the bond nor contract contains any express agreement that Phillips, the contractor, will pay the claims of laborers, materialmen, or subcontractors. Third, that the plaintiff having brought suit in its own name against the city of Waukesha and Phillips without joining the defendant, and having caused the city of Waukesha in such action to pay the balance of the contract price in full, any rights reserved under the contract between Phillips and the city in favor of, or for the protection of, subcontractors and materialmen are waived and satisfied.

It is the contention of the defendant that the plaintiff did

not agree to do the work itself, but agreed to furnish the moneys necessary to pay for the labor and material; that it assumed and agreed to carry out the contract between Phillips and the city; that this agreement in effect placed it in the shoes of Phillips, the contractor, and the plaintiff, therefore, could not be a subcontractor or materialman within the meaning of those terms as used in the contract between the city and the contractor.

It appeared without dispute that the local agent of the defendant attempted to procure the city's consent to the substitution of the plaintiff for Phillips as principal contractor. The city consistently refused to consent to said substitution, in the absence of which it must be held that Phillips remained liable to the city, and the plaintiff was a subcontractor under Phillips, bound by its contract to furnish the materials and labor which Phillips had agreed to furnish in his contract with the city. Plaintiff's agreement to complete the contract was nothing more than an agreement to furnish the labor and material still due from the contractor.

The second and more serious contention of the appellant is that the bond upon which it was a surety contained no clause by which the surety expressly agreed to pay subcontractors and materialmen. The material part of the bond was as follows:

"Now, therefore, the conditions of this obligation are such that if the said C. H. Phillips shall faithfully perform the terms of said contract and specifications on his part to be performed, then this obligation to be void, otherwise to remain in full force and effect."

In addition to the language set out in the statement of facts, the specifications also contain the following clause under the heading *Estimates:*

"These estimates will amount to at least seventy-five per cent. of the value of the completed work, provided that the contractor has paid for his materials and labor performed under the previous payment, and provided that substantial progress is being made on the work."

The trial court found that by reason of these agreements Phillips expressly agreed to pay and settle the claims of all third persons who might furnish material or labor going into the work.

The appellant's contention is that the language used is not sufficient to show a clear intent on the part of the contractor to become liable to third persons, and therefore that the case is ruled by *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, 85 N. W. 648, and *Yawkey-Crowley L. Co. v. De Longe,* 157 Wis. 390, 147 N. W. 334. The language of the contract is that the contractor shall furnish satisfactory evidence "That all claims of all persons . . . have been fully settled." The language in *New York C. J. F. Co. v. Kenosha,* 167 Wis. 371, 167 N. W. 451, is that the city shall be satisfied "that all claims and demands against the plaintiff herein by any subcontractor for work performed or material furnished in the erection and construction of said filtration plant were paid." We think this case is ruled by the *Kenosha Case.* "Fully settled" means paid and discharged. As was said in *Builders L. & S. Co. v. Chicago B. & S. Co.* 167 Wis. 167, 166 N. W. 320, if these clauses are not inserted for the benefit of laborers and materialmen, why are they inserted at all? The contractor agrees to furnish and pay for all the labor and material going into the completed structure. He does not carry out his contract until he has done so. The trial court was right in holding that it was the intention of the parties to the contract to protect third parties who might furnish material or labor going into the work, by insuring payment of their claims, and that the defendant, by the language of its undertaking, became liable in the event of the contractor's default in that respect.

The appellant further contends that the suit brought by the plaintiff against the city and Phillips to determine the amount due, and the subsequent application of the moneys in the hands of the city under the mandate of the judgment,

constituted a waiver and satisfaction of all rights under the contract, and that under the rule laid down in *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, 85 N. W. 648, the contractor was relieved from further performance under that clause of the contract which required him to furnish satisfactory evidence that all claims had been fully settled.

In the *Electric A. Co. Case* payment by the city was voluntary and in defiance of the expressed terms of the contract, and it is pointed out that there was no express agreement for the benefit of third parties. In this case, on the contrary, the common council adopted a resolution directing that no payments be made until satisfactory evidence should be furnished of the payment of claims for labor and material. In its answer in the suit the city set up its willingness to pay as soon as such evidence was furnished. Under these facts no inference of waiver arises, nor can the action of the city in paying the money in response to the judgment of the court be said to be voluntary.

Our conclusions make consideration of other questions raised unnecessary.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on June 1, 1920.

A. J. MONDAY COMPANY, Appellant, vs. AUTOMOBILE, AIRCRAFT & VEHICLE WORKERS OF AMERICA, LOCAL NO. 25, and others, Respondents.

March 13—June 1, 1920.

Injunction: Use in labor disputes: Strike for closed shop: Constitutional law: Right of employer to hire whom he pleases: Appeal: Record not containing evidence or findings of fact: Disposition of appeal.

1. The right of an employer to exercise his constitutional privilege as to whom he will employ is established in this state.

2. Ch. 211, Laws 1919, providing that no restraining order or injunction shall issue in disputes "concerning terms or conditions of employment," is inapplicable to a strike purely and simply for a closed shop, there being no complaint as to the conditions under which employees were required to work or the wages paid.
3. It is within the peculiar province of the trial court to determine the facts to which the law is to be applied, and, where the record does not contain all of the evidence upon which a final determination of the facts must rest, an order appealed from will stand.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The plaintiff is engaged in the business of building, painting, and trimming automobile bodies. The defendant, the *Automobile, Aircraft & Vehicle Workers of America, Local No. 25,* is a voluntary unincorporated organization of men working as employees in connection with the building, painting, and trimming of automobile bodies and similar products. The other defendants are officers, agents, or representatives of *Local No. 25,* and are not now and have not been at any of the times hereafter referred to employees of the plaintiff.

On or about September 5, 1919, *Local No. 25* called a strike of the plaintiff's employees because the plaintiff refused the demand made by *Local No. 25* to establish a closed shop and a union shop committee. December 22, 1919, this action was begun, and upon a verified complaint supported by affidavits there was issued a temporary restraining order prohibiting *Local No. 25,* the other defendants, and their employees, servants, and agents, from doing certain things complained of. Subsequently, upon an amended complaint, the plaintiff moved the court to amend the order of December 22, 1919, in certain particulars hereafter referred to. At the same time certain of the defendants moved to vacate the order of December 22d. The two motions were heard together, and upon the hearing the following facts appeared substantially without dispute: That the business of *A. J.*

Monday Company and of A. J. Monday, its predecessor, had been established about fifteen years; that at the time of the calling of the strike the plaintiff was employing twenty-five employees, but not since the first three weeks of the strike were any of the men who had been doing picketing and patroling former employees of the plaintiff; that none of the defendants were in the employ of the plaintiff at the time of the calling of the strike, and only one of them had ever at any time been in the plaintiff's employ; that the strike was called to enforce the demand for a closed shop and a union shop committee. It further appeared that there was no controversy as to wages, hours, or the conditions under which the work was done in the factory; that through the efforts of the defendants the plaintiff had lost a considerable volume of business; that of the twenty-five men employed by the plaintiff at the time of the commencement of the strike thirteen remained with the plaintiff continuously; that all of the pickets were employed and paid by *Local No. 25;* that the strike was called by *Local No. 25;* that it had not been conducted by the employees of the plaintiff for more than six weeks prior to the hearing; that such of the former employees of the plaintiff as had left at the time the strike was called are employed and working at other places; that not all of the men who struck were members of the union, and that those who were not had not become members of the union since the strike. That at or about the same time a strike was called at five plants in the city of Milwaukee, but that the efforts of the union were concentrated largely on the plaintiff's plant because the plaintiff was most stubborn in regard to unionizing its plant; that the plant of the plaintiff was consistently picketed by four pickets, some or most of whom wore badges "Strike on;" that all persons approaching the plant were accosted by these pickets and informed of the strike, both persons seeking employment and customers.

Upon the hearing the court denied the motion of the defendants to vacate the temporary injunction; held ch. 211,

Laws 1919, applicable; denied the plaintiff's motion to extend or amend the injunction; and modified it so as not to restrain picketing and patroling and guarding the streets. The court also changed the original injunctional order so as to permit the recommending, advising, and persuading of employees by peaceful and lawful means to abstain from working for the plaintiff, and by permitting the defendants, by recommending, advising, and persuading persons wishing to patronize or employ the plaintiff, by peaceful and lawful means, to cease to so patronize and employ the plaintiff.

From the order so modified the plaintiff appeals.

For the appellant there was a brief by *Lamfrom & Tighe,* attorneys, and *Leon B. Lamfrom* and *Marvin W. Wallach,* of counsel, all of Milwaukee, and oral argument by *Mr. Leon B. Lamfrom* and *Mr. Wallach.*

For the respondents there was a brief by *Joseph A. Padway,* attorney, and *A. W. Richter,* of counsel, both of Milwaukee, and oral argument by *Mr. Richter.*

ROSENBERRY, J. It is the claim of the plaintiff that the court erred in refusing to extend the injunctional order of December 22d as requested, and that the court erred also in modifying it as hereinbefore indicated. (The original order and the order as modified are printed in the margin.)[1]

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[1] *Injunctional order.*

On reading the foregoing verified complaint of plaintiff herein and the affidavits thereto attached, and from which it appears that necessity exists therefor, and the plaintiff having given an undertaking as required by law in the sum of two hundred fifty dollars ($250), and on the motion of Lamfrom & Tighe, attorneys for plaintiff,

It is ordered that the defendants and each of them, their employees, servants, and agents, and all of the members of said *Automobile, Aircraft & Vehicle Workers of America, Local No. 25,* do absolutely desist and refrain from entering or attempting to enter the plaintiff's premises, consisting of its plant at No. 321-327 Fourth street, in the city of Milwaukee, county of Milwaukee, and state of Wisconsin, and from obstructing or attempting to obstruct the free passage of any employee or employees of your plaintiff or of the customers of your plaintiff, or of any persons

In addition to the facts already stated, it appears by the verified complaint that the object of the strike was to compel plaintiff "to adopt what is known as the closed shop; that is to say, to force the plaintiff to enter into an agreement with said labor organization not to employ any employees who are not members of said labor union, and also for the

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attempting to transact any business with your plaintiff, in going to and from plaintiff's premises, from in any wise threatening or using coercive language or coercion whatever, in order to induce any employees of plaintiff not to work for plaintiff, and from in any wise interfering with or annoying by act or words any such employee of plaintiff against his will in going to and from, or while engaged in such employment, and from interfering with or molesting in any manner whatsoever any person or persons other than the employees of the plaintiff who enter or attempt to enter or leave or attempt to leave the plaintiff's said premises for the purpose of transacting business with the plaintiff, and from entering its grounds and premises for the purpose of interfering with, hindering, or obstructing its business, or from compelling or inducing or attempting to compel or induce by threats, intimidations, annoying language, or acts of force and violence any of the employees of plaintiff to refuse or fail to perform their duties as such employees, and from compelling or inducing, or attempting to compel or induce by threats, intimidation, annoying language, or acts of force and violence, any of the employees of the plaintiff to leave the service of the plaintiff, or any customers of the plaintiff, or persons wishing to transact business with the plaintiff, from transacting such business with the plaintiff, and from preventing or attempting to prevent any person or persons by threat or intimidation, annoying language, or acts of force and violence from entering the service of the plaintiff, and from congregating at or near said premises of the plaintiff, or in the public highway for the purpose of intimidating plaintiff's employees or preventing them from rendering their services to plaintiff or for the purpose of preventing customers and persons from transacting business with the plaintiff, and from inducing by the payment of money or by promises to pay money or coercing by threats, annoying language, or acts said employees to break their contracts of employment with this plaintiff and to leave its employment, and from collecting either singly or in combination with others in and about the approaches of plaintiff's said plant or in the public highway, for the purpose of picketing or guarding the streets, highways, and approaches of the plaintiff's plant for the purpose of intimidating or coercing any of the plaintiff's employees in going to and from their work and the said premises of the plaintiff, and from congregating at or about any place in the city of Milwaukee, Wisconsin, for the purpose of intimidating, threatening, or coercing any person or persons seeking employment with the plaintiff, and from patroling or guarding the

purpose of forcing the plaintiff to establish a union shop committee."

The question presented upon the motion was determined by the trial court upon the theory that the provisions of ch. 211, Laws 1919, were applicable to this case. The appeal here is taken mainly for the purpose of determining the constitutionality of that law, which is as follows:

"Section 1. A new section is added to the statutes to read: Section 1747*ee*. Nothing contained in the anti-trust laws

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streets, highways, and approaches of plaintiff's said premises in any manner for the purpose of intimidating, coercing, or threatening customers of the plaintiff or persons desiring to do business with the plaintiff or to transact business with the plaintiff, from doing so, or from going, either singly or collectively, to the home of plaintiff's employees or any of them for the purpose of intimidating or coercing any of them to leave the service of the plaintiff, or to prevent any person by threat, intimidation, force, or violence from entering the service of this plaintiff, until the further order of this court.

Dated at Milwaukee, in the county of Milwaukee, this 22d day of December, 1919. MAX W. NOHL,
Court Commissioner, Milwaukee, Wis.

Order refusing to extend injunctional order.

The above entitled action having come on to be heard before that branch of the above court presided over by the Honorable OSCAR M. FRITZ, circuit judge, upon the order to show cause of the plaintiff dated January 3, 1920, why the injunctional order of Max W. Nohl, court commissioner, Milwaukee county, Wisconsin, dated December 22, 1919, should not be changed and amended in the manner set forth in said order to show cause, and on the motion of the defendants, *Edward E. Newman, Fred Kloppenburg, Bernard N. Knueppel, Andrew Steinbach,* and *Michael, alias John Murphy,* to vacate the injunctional order granted by Max W. Nohl, court commissioner, in the above entitled matter on the 22d day of December, 1919; on the 5th, 6th, and 9th days of January, 1920, and the court having heard the evidence adduced, proofs offered, and the arguments of counsel, and being now fully advised in the premises,

It is ordered: First. That the order to show cause of the plaintiff, dated January 3, 1920, why the injunctional order of Max W. Nohl, court commissioner, Milwaukee county, Wisconsin, dated the 22d day of December, 1919, should not be changed and amended in the respects set forth in said order to show cause, be and the same is hereby denied.

Second. It is further ordered that the motion of the defendants, *Edward E. Newman, Fred Kloppenburg, Bernard N. Knuep-*

shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws. The labor of a human being is not a commodity or article of commerce.

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pel, Andrew Steinbach, and *Michael, alias John Murphy,* to vacate said injunctional order of Max W. Nohl, court commissioner, dated December 22, 1919, be and the same is hereby denied.

Third. That the said injunctional order of Max W. Nohl, court commissioner, dated December 22, 1919, be changed and amended so that it shall read: "It is ordered that the defendants and each of them, their employees, servants, and agents, and all of the members of said *Automobile, Aircraft & Vehicle Workers of America, Local No. 25,* do absolutely desist and refrain from entering or attempting to enter the plaintiff's premises, consisting of its plant at No. 321-327 Fourth street, in the city of Milwaukee, county of Milwaukee, and state of Wisconsin, and from obstructing or attempting to obstruct the free passage of any employee or employees of your plaintiff, or of the customers of your plaintiff, or of any persons attempting to transact any business with your plaintiff, in going to and from plaintiff's premises, from in any wise threatening or using coercive language or coercion whatever, in order to induce any employees of plaintiff not to work for plaintiff, and from in any wise interfering with or annoying by act or words any such employee of plaintiff against his will in going to and from, or while engaged in, such employment, excepting by recommending, advising, or persuading such persons by peaceful and lawful means to abstain from working for the plaintiff, and from interfering with or molesting in any manner whatever any person or persons other than the employees of the plaintiff, who enter or attempt to enter, or leave or attempt to leave the plaintiff's said premises for the purpose of transacting business with the plaintiff, excepting by recommending, advising, and persuading such persons by peaceful and lawful means to cease to patronize or employ the plaintiff, and from entering its grounds and premises for the purpose of interfering with, hindering, or obstructing its business or from compelling or inducing, or attempting to compel or induce by threats, intimidations, annoying language, or acts of force and violence, any of the employees of plaintiff to refuse or fail to perform their duties as such employees, and from compelling or inducing, or attempting to compel or induce by threats, intimidation, annoying language, or acts of force and violence, any of the employees of the plaintiff to leave the service of the plaintiff, or any customers

"Section 2. A new section is added to the statutes to read: Section 1747*ff*. 1. Working people may organize themselves into or carry on labor unions and other associations or organizations for the purpose of aiding their members to become more skilful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit.

"2. No restraining order or injunction shall be granted by any court of this state, or a judge or judges thereof, in any case between an employer and employee, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate

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of the plaintiff, or persons wishing to transact business with the plaintiff, from transacting such business with the plaintiff, and preventing or attempting to prevent any person or persons by threat or intimidation, annoying language, or acts of force and violence, from entering the service of the plaintiff, and from congregating at or near said premises of the plaintiff, or in the public highway, for the purpose of intimidating plaintiff's employees or preventing them from rendering their service to the plaintiff or for the purpose of preventing customers and persons from transacting business with the plaintiff, and from inducing by the payment of money, or by promises to pay money, or coercing by threats, annoying language, or acts, said employees to break their contracts of employment with this plaintiff, and to leave its employment, and from collecting, either singly or in combination with others, in and about the approaches of plaintiff's said plant or in the public highways."

Fourth. That the said injunctional order of the said Max W. Nohl, court commissioner, dated December 22, as amended and modified herein, shall stand *pendente lite*.

Fifth. That there be no costs to either party upon these motions.

Dated this 13th day of January, 1920.

By the Court: OSCAR M. FRITZ,
Circuit Judge.

remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"3. No such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any laws of this state."

Ch. 211 was an attempt to engraft upon the laws of this state certain provisions of the act of Congress of October 15, 1914 (38 U. S. Stats. at Large, 730, ch. 323), commonly known as the Clayton Act. This was done without any reference to the fundamental distinction between the power of Congress to regulate procedure in and limit the jurisdiction of federal courts, inferior to the United States supreme court, and the power of the legislature to regulate procedure and limit the jurisdiction of the courts created by the constitution of a state.

We shall not enter into any discussion of the provisions of ch. 211, the economic policies involved therein, or the constitutionality of that act, for we are of the opinion that it has no application to the facts in this case; hence any discussion here would be merely academic. The right of an

employer to exercise his constitutional privilege as to whom he will employ has been fully established in this state. *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098.

The provisions of sec. 1, ch. 211, are simply declaratory of the law as it existed prior to its enactment. No one is here contending that *Local No. 25* is an illegal combination. No question of wages is involved, so the declaration of this section as to the character of labor is immaterial here. Sub. 1, sec. 2, provides that working people may organize themselves into an association for certain purposes there enumerated. The strike involved in this case was not called for the purpose of doing any of the things therein enumerated. It is a strike purely and simply for the closed shop. The closed shop does not aid the members of *Local No. 25* to become more skilful or efficient workers, to promote their general welfare, elevate their character, or to regulate their wages, hours, or conditions of labor in any except an indirect and remote way. It is conceded in this case that the plaintiff was paying the union scale of wages, and there is here no complaint as to the conditions under which the employees of the plaintiff were required to work. Sub. 2, sec. 2, provides that injunctions shall not issue in disputes "concerning terms or conditions of employment." In this case there is no such dispute. This is a strike to compel the plaintiff to employ none but the members of the union, and thereby to prevent him from employing persons not members of the union. It has nothing to do with wages, hours, or conditions of employment. Sub. 3, sec. 2, refers to the issuance of injunctions described in sub. 2. This case does not raise the question, so often considered by courts, of a strike for a lawful or an unlawful purpose. We think the trial court was in error in holding that ch. 211 applies to this case.

This case is here upon affidavits. There has been no trial; consequently none of the facts are found by the trial

court. The trial court has made no determination of the issues in this case considered apart from the provisions of ch. 211.

Under such circumstances we think it better practice to permit the order appealed from to stand. Upon the *remittitur* being filed, if either side desires to test the matter further before trial it can be done by renewing the motions, or the determination can be postponed to the end of the trial, when the facts are fully found.

We shall not attempt to discuss the general principles of law applicable, as it can only be done in connection with the facts. There having been no trial, the ultimate facts not being established, the discussion would for that reason probably be misleading. As has been said many times by this court, it is within the peculiar province of the trial court to determine the facts to which the law is to be applied. We do not have before us here a record which contains all of the evidence upon which the final determination of the facts must rest. In such a case the court, in some instances at least where the evidence strongly preponderates, will state the facts. Here there has been no trial. The record is incomplete.

By the Court.—The order appealed from is affirmed, neither party to recover costs in this court, except that appellant shall pay the clerk's fees.

GAUERKE, Respondent, vs. KILEY, Appellant.

April 6—June 1, 1920.

Breach of marriage promise: Evidence: Fact of pregnancy: Proof of circumstances attending birth of child: Testimony of plaintiff that defendant attempted an abortion: Damages: Proof of wealth of defendant at time of trial: Punitory damages: Appeal: Prejudicial error: Withdrawal of improper evidence.

1. In an action for breach of a promise of marriage, where the complaint alleged seduction in aggravation of damages, compensation may be allowed by the jury for mental suffering, injury to reputation, and loss of virtue, but not for damage occasioned by the seduction, independent of the promise, such as medical expenses and loss of time.
2. Evidence of pregnancy and birth of a child resulting from the seduction is admissible to show publicity and extent of injury to reputation.
3. Evidence of an attempt by defendant to cause abortion, and that plaintiff was alone when the child was born, is inadmissible as having no legitimate bearing on any of the elements which may be considered in aggravation of damages.
4. The admission of evidence of plaintiff that she was alone at the time of child-birth and that at the time of trial the child was dead, was prejudicial as calculated to excite sympathy for plaintiff and prejudice against defendant.
5. Testimony by plaintiff that defendant attempted to cause an abortion cannot corroborate her testimony as to the seduction.
6. Error in admitting evidence deliberately offered by a party prior to adjournment of the court for the day is not cured by the voluntary withdrawal of such evidence by the party on the convening of court on the next day.
7. Evidence of the wealth of the defendant at the time of trial is admissible on the question of punitory damages and also on the issue of compensatory damages, as the best evidence of the prospects, at the time of breach, of which plaintiff was deprived by defendant's wrongful act.

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Reversed.*

Action to recover damages for breach of promise of marriage. The complaint alleges that on or about the 1st day of August, 1917, plaintiff and defendant entered into a

marriage agreement; that by reason of said promise of marriage the defendant debauched the plaintiff, because of which, and defendant's refusal to marry plaintiff, she is damaged, etc. The answer was a general denial.

By a special verdict the jury found that defendant promised to marry the plaintiff; that the plaintiff held herself in readiness to marry the defendant at all times between August 1, 1917, and July 1, 1918; that the defendant breached the contract of marriage; that under and by virtue of such promise of marriage defendant seduced the plaintiff; and assessed as damages, compensatory $13,000, punitory $2,000. Upon the verdict so rendered judgment was entered against the defendant in the sum of $15,000, from which he brings this appeal.

For the appellant there was a brief by *Silverwood, Fontaine & McCreery* of Green Bay, and oral argument by *A. B. Fontaine* and *T. P. Silverwood.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *John F. Martin* and *Gerald F. Clifford,* all of Green Bay.

OWEN, J. Numerous alleged errors with reference to the admission of testimony are presented, in the consideration of which a proper understanding of the measure of damages applicable in actions to recover for a breach of promise of marriage accompanied by seduction will be helpful. In *Leavitt v. Cutler,* 37 Wis. 46, 53, it was held that in such an action, where the complaint alleged seduction in aggravation of damages, such seduction might properly be considered as enhancing the damages, and the jury would be justified in rendering a verdict for such liberal amount as in their judgment would be a fair compensation for mental suffering, injury to reputation, and loss of virtue thus sustained by the plaintiff. This rule was approved in *Giese v. Schultz,* 53 Wis. 462, 464, 10 N. W. 598, where it was also pointed out that other elements of injury, such as loss of

time, expense of medical attendance, and the like, are too remote and not the proximate result of the breach of promise. It was distinctly held that in a breach-of-promise action where seduction was shown to have resulted by virtue of the marriage promise, not all of the elements of damages recoverable in an action for seduction could be recovered in an action based upon the breach of promise to marry, because while many of the elements of damages recoverable in the action for seduction were the proximate result of the seduction they were not necessarily the proximate result of the breach of promise. Courts have not been entirely satisfied with the logic which authorizes the recovery of damages flowing from a tort (the seduction) in an action for damages for breach of promise to marry. Some courts have repudiated the logic altogether and refused to recognize seduction as an element in aggravation of damages in a breach-of-promise action. But the overwhelming authority supports the view that it is proper to take into consideration, in aggravation of damages, the fact that the defendant seduced the plaintiff under a promise of marriage. 9 Corp. Jur. 376; 3 Sutherland, Damages (3d ed.) §§ 984, 985. The extent to which the seduction may be considered in aggravation, however, is generally limited, as stated in *Leavitt v. Cutler, supra,* and *Giese v. Schultz, supra,* to compensation for "mental suffering, injury to reputation, and loss of virtue."

One of the questions here presented is whether proof of pregnancy and the birth of a child as the result of the seduction may be proved. This seems to be a mooted question, and, on principle, it would seem that, if loss of reputation is an element which the jury may take into consideration upon the proof of seduction, the publicity and notoriety of the fact of seduction is a material inquiry, and that where pregnancy or the birth of an illegitimate child results from the seduction the publicity and notoriety thereof must be greatly enhanced. In truth, in the absence of pregnancy

or the birth of an illegitimate child the fact of seduction, as a rule, acquires no authentic publicity whatever, and there is no consequent loss of reputation. It seems illogical, therefore, to say that plaintiff may recover for loss of reputation where seduction results from the marriage promise, but that she is not permitted to prove loss of reputation by showing pregnancy or the birth of an illegitimate child as a result thereof. As said by Mr. Sutherland in his work on Damages, *supra,* § 985: "Mental suffering may result from seduction without pregnancy following; but compensation for disgrace or injury to reputation must be based on the theory that seduction has resulted in pregnancy." We think, upon principle, therefore, that under an allegation of seduction as a result of the marriage promise, in an action for the breach of a contract of marriage, the plaintiff should be permitted to show pregnancy and the birth of an illegitimate child as bearing upon the question of injury to reputation, which, under the rule of the Wisconsin cases *supra,* is an element which may be considered in aggravation under such circumstances. The only question to be considered is whether this court is already committed to the negative of this proposition.

The case of *Giese v. Schultz* made its second appearance in this court and is reported in 65 Wis. 487, 27 N. W. 353. A cursory reading of the opinion there rendered leaves the impression that it was held that pregnancy could not be shown under such circumstances. A close analysis of the opinion discloses, however, that it was not so ruled. It is pointed out in the opinion that the following question was asked of the plaintiff: "Did anything result, any bad consequences result, from the seduction?" The witness answered: "Yes, sir; he got me with child." The court then says:

"We are not prepared to say that this evidence was proper, even for the purpose named, to show publicity of the seduction, and are disposed to doubt it; but it became very

improper when the fact elicited was treated as an independent cause of injury in the charge of the court to the jury, as will hereafter appear."

The court then refers to the fact that the plaintiff was permitted to testify that as a result of the pregnancy she cried day and night for two or three weeks, when a miscarriage occurred. The trial court in that case charged the jury that

"In such case you may go beyond what would be a compensation for the loss of marriage, for her wounded pride, and the mental and physical suffering she has sustained on account of the breach of the marriage contract, and give such damages as may be just and fair, and for mental suffering, injury to reputation, loss of virtue, and sense of disgrace sustained by plaintiff on account of such seduction. *In such case you may give a fair compensation for this additional injury.*"

This court then said:

"This last clause was so general, far-sweeping, and comprehensive that it would include the plaintiff being gotten with child, and her miscarriage, and whatever other personal injuries may have followed the seduction, as proper to be considered in estimating her damages. When the instruction preceding this clause had been given, the rule laid down in *Leavitt v. Cutler, supra,* and repeated on the former appeal of this case, was fully complied with, with the addition also of 'a sense of disgrace,' and there the instruction should have ended. But it did not; and the jury were left to their own estimate of the unlimited damages flowing from this 'additional injury and disgrace.' "

We conclude that the court did not pass upon the question of whether or not proof of pregnancy, as bearing upon the extent of the publicity given to the seduction as a consequent injury to reputation, was admissible, and that the question is an open one in this court. We therefore hold, upon principle, that in an action of this kind, where the complaint contains an allegation of seduction resulting from the promise of marriage, evidence of pregnancy as the result of such

seduction is admissible as bearing upon the extent of injury to reputation as a consequence of the seduction. We should say that we do not consider this conclusion foreclosed by certain language in *Hanson v. Johnson,* 141 Wis. 550, 124 N. W. 506, as the question here presented was not there necessarily involved. This discussion disposes of a number of questions raised by appellant's counsel which it will be unnecessary to treat *seriatim.* What has been said will be ample guidance for the court in disposing of such questions upon a new trial, which we feel must be ordered for errors which will now be pointed out.

The plaintiff was permitted to testify to an attempted abortion, in the following language:

"In October I didn't menstruate, and I told him about it, and he said if I wouldn't in a few days, he would give me some kind of pill that would make me menstruate if I wasn't pregnant, and he called me in a couple of days and asked me, and I told him I had not menstruated as yet, and he said he would come up that evening to give me some pills. He brought me the pills and told me how to take them. I took them. He told me to take two of them and he would call me the next day and ask me. He called me the next day and I told him 'No,' and he said 'Well, you had better take the other three, and if those don't help you will have to go to Milwaukee right away.' I took the other three and didn't menstruate. He said I would have to make arrangements to go to Milwaukee right away if I possibly could, and I told him I couldn't do it right away, but I probably could do it in a couple of weeks, and he says that would be all right."

She was also permitted to testify that there was no one with her at the time of child-birth and that at the time of trial the child was dead. This testimony is plainly condemned by *Giese v. Schultz,* 65 Wis. 487, 27 N. W. 353. There is no causal relation between the breach of the marriage promise and the attempted abortion nor the fact that she was alone at the time of child-birth nor that at the time of trial the child was dead. Such evidence had no legiti-

mate bearing upon any of the elements which may be considered in aggravation of damages as a result of the seduction. That it had a prejudicial effect upon the defendant cannot be doubted. The verdict in this case is a very substantial one, and that a portion of it was due to the perfidious light in which the defendant was placed before the jury by reason of proof of his having advised, counseled, and attempted an abortion upon the plaintiff is more than probable. Likewise the testimony that plaintiff was alone at the time of child-birth and that at the time of trial the child was dead was well calculated to excite the sympathy of the jury and swell the verdict in her behalf.

It is true that with reference to this testimony the court charged the jury as follows:

"There has been evidence offered and introduced tending to show that the plaintiff was with child as a result of intercourse with defendant, and that said child died, and certain evidence by the plaintiff tending to show that the defendant gave certain pills and medicine to the plaintiff with a view of producing an abortion. This testimony was admitted as bearing upon the issue of whether plaintiff was in fact seduced by defendant and whether there was in fact a promise of marriage."

In other words, the court attempted by this charge to limit this evidence to corroboration of her own testimony as to promise of marriage and the fact of seduction. The plaintiff had testified to the promise of marriage and to the seduction. We fail to see how the fact that the child died was corroborative of either of these propositions. Neither do we perceive how the testimony relating to the attempted abortion coming from the plaintiff herself was in any sense corroborative of her former testimony with reference to the promise of marriage and the seduction. She had testified squarely and frankly upon both of these issues. If some third party had been able to testify to the fact of defendant's attempted abortion it would be corroborative of her testimony with reference to the seduction, but how her

own testimony to this culpable conduct on the part of the defendant could in any manner corroborate her testimony as to the seduction we are unable to perceive. Her testimony as to the fact of seduction was not strengthened or corroborated by her own testimony as to the attempted abortion. If she was manufacturing her testimony as to the seduction, she could as well go further and manufacture the testimony as to abortion. For this error there must be a new trial.

Evidence was introduced tending to show the extent of publicity given to the fact of plaintiff's pregnancy and the subsequent birth of an illegitimate child. This evidence was introduced late in the afternoon of the day shortly before the court adjourned, and plaintiff's counsel, at the beginning of the proceedings on the following day, called attention to the evidence and requested that it be withdrawn from the consideration of the jury and that the court instruct the jury to disregard it in arriving at their verdict. This motion was granted and the court so instructed the jury. Respondent contends, first, that if the introduction of this evidence was improper, the withdrawal thereof in the manner indicated cured the error of its admission. We desire to say that we should be very reluctant to hold that if the introduction of the evidence was improper the error could be thus cured by its withdrawal on the day after its reception. While this court has frequently held that the striking out of evidence improperly received sufficed to cure the error involved in its reception, we are not disposed to permit attorneys to gamble upon such matters. Where an attorney deliberately offers evidence, permits the effect thereof to remain with the jury over night, and attempts to save himself from the error of its introduction while in a measure retaining the benefits thereof, by withdrawing the same the next day, it should quite plainly appear that prejudicial error did not follow in order to save a reversal. Where inadmissible evidence is promptly stricken after its

receipt its effect upon the jury is minimized. But where it is permitted to remain with the jury a considerable length of time its effect cannot easily be neutralized or dissipated. *Alsheimer v. State,* 165 Wis. 646, 163 N. W. 255. Furthermore, a greater presumption of non-prejudicial error should be indulged where the damaging testimony is volunteered by a partisan or loquacious witness without the procurement of the party benefited thereby than when it is deliberately introduced by him. In this case, however, we do not think the introduction of the evidence constituted error. This follows from what has been said in our opening discussion.

The court admitted evidence of defendant's wealth as of the time of the trial. This is assigned as error. Evidence of the wealth of the defendant was admissible in this case as bearing upon both punitory and compensatory damages. It is well settled, upon both reason and authority, that evidence of the wealth of the defendant as of the time of trial is admissible upon the question of punitory damages. 2 Sutherland, Damages (4th ed.) § 405. In this case we also think it is proper on the question of compensatory damages, although there is a dearth of authority upon this question. In *Dent v. Pickens,* 34 W. Va. 240, 12 S. E. 698, it was held that, while evidence of the wealth of the defendant was admissible as tending to illustrate the advantages which plaintiff would have secured by the marriage, no evidence could be given of any fact having a tendency to aggravate or diminish the damages which occurred after the commencement of the suit. This doctrine was followed in *Vierling v. Binder,* 113 Iowa, 337, 85 N. W. 621, where the court said:

"Appellant also objects that the evidence introduced related to his pecuniary condition at the time of trial, and not at the time of the making of the promise, but the time to which the evidence related was not so remote from that at which the promise was claimed to have been made as to render it inadmissible on that theory."

In *Fisher v. Kenyon,* 56 Wash. 8, 104 Pac. 1127, it is held that evidence of the financial ability of the defendant should be confined to the time of the breach. It is intimated in *Douglas v. Gausman,* 68 Ill. 170, that proof of defendant's financial circumstances should relate to the time of trial. In view of these various holdings that proof of financial ability should be confined to the date of the promise, the date of the breach, the commencement of the suit, and to the time of trial, we feel at liberty to consider the question as an original proposition.

There is no dispute upon the proposition that the financial loss resulting to the plaintiff by reason of the breach of promise of marriage is a proper element to be considered in assessing damages. By reason of the breach of promise the plaintiff has lost a life association and settlement the character of which depends upon the financial standing and ability of the defendant, and, for obvious reasons, it has been held that the plaintiff may show the earning capacity of the defendant for the purpose of showing the condition in life which plaintiff would have attained by consummation of the contract. *Rime v. Rater,* 108 Iowa, 61, 78 N. W. 835. If plaintiff may show the financial prospects of the defendant, why may she not show the facts as they exist at the time of trial when such prospects have been reduced to a reality? Upon this question, as all others, the best evidence attainable should be produced. What will occur in the future is always a matter of more or less speculation, an inference to be drawn from present or past circumstances, and the condition of defendant at the time of trial furnishes a more certain basis for an estimate than does the condition of defendant at any prior date. The successes or failures of the defendant during the interim between the promise or the breach and the time of trial may shed most valuable light upon the question of his future prospects and enable the jury to form the best judgment possible with reference thereto. We think the evidence of the financial

condition of the defendant as it exists at the time of trial is proper in an action for breach of promise as bearing upon the question of compensatory as well as punitory damages.

Other errors relied upon by appellant are either ruled by prior decisions of this court or relate to the sufficiency of the evidence to support the verdict. These have been carefully considered and the conclusion reached that they cannot be held prejudicial error. We cannot say that the verdict is not supported by the evidence. But for reasons before pointed out there must be a new trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

ESTATE OF STANCHFIELD.

April 7—June 1, 1920.

States: Federal government: Conflict of laws: National banks as fiduciaries.

The state statute (sec. 2024—*77r*, Stats.) prohibiting courts from appointing as trustees or other fiduciaries corporations not organized under secs. 2024—*77i* to 2024—*77q* must yield to sec. 11 (k) of the act of Congress of December 23, 1913 (38 U. S. Stats. at Large, 251, ch. 6), establishing the federal reserve board and authorizing such board to permit national banks to act as fiduciaries when not in contravention of state or local law, and the amendment of September 26, 1918 (40 U. S. Stats. at Large, 968, ch. 177), declaring that, if the state law permits banks, trust companies, or other corporations which compete with national banks to exercise fiduciary powers, the granting and exercise of these powers by national banks shall not be deemed in contravention of state or local law; and the request of the petitioner that a national bank be appointed executor of his father's estate should have been granted.

APPEAL from an order of the county court of Fond du Lac county: A. E. RICHTER, Judge. *Reversed.*

S. B. Stanchfield, father of the petitioner, *George H. Stanchfield,* made a will giving all of his property to the

petitioner, in which will no executor was appointed. *George H. Stanchfield* petitioned the court to probate the will and to appoint the Commercial National Bank of Fond du Lac administrator of the estate. The petitioner claims that the Commercial National Bank of Fond du Lac has been given power under the federal statutes and a permit of the federal reserve board to act in such trust capacity.

Hearing was had on the petition and the will admitted to probate. The court, however, denied the petition to appoint the bank as administrator on the grounds that ch. 180, Laws 1919, prohibits such appointment.

Appeal is taken by petitioner from the order denying the petition to appoint such bank as administrator.

For the appellant there was a brief by *Sutherland, Hughes & Sutherland* of Fond du Lac, and oral argument by *Alfred D. Sutherland* and *D. D. Sutherland.*

SIEBECKER, J. The county court denied the application to appoint the Commercial National Bank of Fond du Lac administrator of decedent's estate upon the ground that the provisions of sec. 2024—*77r,* Stats. 1919 (ch. 180, Laws 1919), forbid such appointment. This statute provides:

"No court of this state shall appoint or name any corporation as trustee, executor, administrator, guardian, assignee, receiver or in any other fiduciary capacity unless such corporation is organized and existing under the provisions of sections 2024—*77i* to 2024—*77q* of the statutes."

Of course the Commercial National Bank is not organized or existing under the statutes of this state. The effect of the county court's ruling is that the provisions of sec. 2024—*77r,* prohibiting appointment of corporations as fiduciaries, are valid and applicable to national banks. In the case of *First Nat. Bank v. Fellows ex rel. Union T. Co.* 244 U. S. 416, 37 Sup. Ct. 734, the United States supreme court has held that Congress has the power to confer on

national banks the right to "act" as trustees, executors, administrators, and in other fiduciary capacities, and that Congress did, by sec. 11 (k) of the act of Congress approved December 23, 1913, establishing the federal reserve board (38 U. S. Stats. at Large, 251, ch. 6), properly give such board authority "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator," etc. The grounds of the court's holding are fully expressed in the head-note to the case, as follows:

"The circumstance that a function is of a class subject to state regulation does not prevent Congress from authorizing a national bank to exercise it, nor would it lie with the state power to forbid this. A business not inherently such that Congress may empower national banks to engage in it may nevertheless become appropriate to their functions if, by state law, state banking corporations, trust companies, or other rivals of national banks are permitted to carry it on."

As stated by Chief Justice WHITE in expressing the opinion of the court:

"Manifestly this excluded the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which under the constitution it had a right to exercise."

It is there held that if state banks, trust companies, and other rivals or *quasi*-rivals of national banks are permitted to carry on a business not inherently such as may be conferred by Congress on national banks, such rights possessed by these rivals may make it appropriate to be conferred on national banks to enable them to perform their functions.

Since this decision by the federal supreme court, Congress by act of September 26, 1918 (40 U. S. Stats. at Large, 968, ch. 177), among other things added to the original provi-

sions of sec. 11 (k) conferring fiduciary powers, the following:

"... or in any other fiduciary capacity in which state banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located. Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of this act."

National banks, within the legitimate powers conferred on them by Congress, cannot "be interfered with by state legislation or judicial action, except so far as the law-making power of the government may permit." *Van Reed v. People's Nat. Bank,* 198 U. S. 554, 25 Sup. Ct. 775.

It is clear that the powers conferred on corporations in Wisconsin to act as trustees and other fiduciaries make these corporations rivals of the Commercial National Bank of Fond du Lac under the power conferred on it by the federal reserve board and the acts of Congress. Under these circumstances the state must yield to the rights so conferred on national banks. *Hamilton v. State* (Conn.) 110 Atl. 54.

Upon the facts of record in this case, the petitioner, *George H. Stanchfield,* was entitled as a matter of right to have the county court pass upon the prayer of his petition for the appointment of the Commercial National Bank of Fond du Lac as administrator of the estate of S. B. Stanchfield, deceased. The order of the county court denying the petition for the appointment of such national bank as administrator upon the ground that such national bank cannot legally act in the capacity of administrator was erroneous and must be reversed. The case will be remanded to the county court with direction to pass upon this application of such petitioner and for further proceedings in such county court according to law.

By the Court.—It is so ordered.

STATE, Appellant, vs. LAABS and others, Respondents.

April 9—June 1, 1920.

Health: Police power of state: Abatement of nuisances: Expense of removal: Liability of owner and occupant of lands under land contract.

1. It is within the police power of the state, through the state board of health, to exercise the governmental function of protecting health by abating and removing nuisances.
2. It is within the legislative function, in the exercise of the police power of the state, to provide that a menace to the public health in the nature of a nuisance on lands must be removed, and such duty may be imposed upon the owner, the occupant, and the person creating and maintaining the nuisance; and in case of their failure, after notice, to remove it, they or any of them may be made liable to the state for the expenses incurred in removing it.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

The state brought this action to recover $1,260.50 expended by it in the abatement and removal of a nuisance, which nuisance was removed by the Wisconsin state board of health from the premises of these defendants after an order had been issued by the board to the defendants demanding the removal of the nuisance and upon their failure to do so. *Robert Liebenow* was the vendor and *William Laabs* the vendee of the premises in question under a land contract. The fee was in *Robert Liebenow,* possession in the vendee, *William Laabs.*

The case was tried before the court, which held that the vendee, *William Laabs,* was liable and that his interest in the land was subject to a lien in favor of the plaintiff for the expense of removal of the nuisance, and that said lien was subsequent to the interest of the defendant *Robert Liebenow,* vendor under the land contract. The court dismissed the action against the defendants *Robert Liebenow, Marie Liebenow,* and *Clara Laabs* upon the merits. Plaintiff appeals from this judgment.

For the appellant there was a brief by the *Attorney General* and *J. F. Baker,* assistant attorney general, and oral argument by *Mr. Baker.*

For the respondents *Robert* and *Marie Liebenow* there was a brief by *Thompson, Myers & Kearney* of Racine, and oral argument by *W. D. Thompson.*

SIEBECKER, J. The state board of health has the general supervision of the health of the citizens of the state and is granted all powers necessary to provide for the protection of the health of the public and to order what is reasonably necessary to be done for the prevention and suppression of disease and to condemn and abate conditions causative of disease. Sec. 1407*a*—6, Stats. Sub. 11 of this section provides:

"If the owner or occupant of any premises whereon any nuisance detrimental to the public health exists, fails to comply with any order of the board for the abatement or removal thereof, any member of the board, their agents or employees may enter upon the premises to which such order relates, and abate or remove such nuisance. The expense of such abatement or removal shall be paid by the owner or occupant of such premises or by the person who caused or maintained such nuisance, *and such expense shall be a lien upon the lands* upon which the nuisance was maintained."

As declared in *Lowe v. Conroy,* 120 Wis. 151, 97 N. W. 942:

"The power to summarily abate nuisances was fully recognized and established as a principle of the common law, upon the ground that the requirement of preliminary formal legal proceedings and a judicial trial would result in defeating the beneficial objects sought to be obtained." *State ex rel. Nowotny v. Milwaukee,* 140 Wis. 38, 121 N. W. 658.

The legislature no doubt recognized this principle and intended to confer such power on the board of health as would enable it to abate and remove all nuisances that are a menace

to the health of the people. It is clearly within the police power of the state to exercise this governmental function. This statute in its terms imposes a liability for the expense of abating or removing such a nuisance on the owner or the occupant of the premises or upon the persons who caused or maintained it, and provides that the expense thereof shall be a lien upon the lands upon which the nuisance existed. The legislative purpose expressed in these words clearly declares in effect that either of the parties mentioned, namely, the owner, the occupant of the lands, and he who caused or maintained this nuisance, shall be liable for the expense of removing it. It is within the legislative function, in the exercise of the police power, to provide that a menace to the public health in the nature of a nuisance on lands must be removed, and such duty may be imposed on the owner, the occupant, and he who creates and maintains it, and that in case of their failure, after notice, to remove it, they or any one of them shall be liable to the state for the expense incurred in removing it. The state may, in its power of police regulation, adopt such measures as are reasonable for the protection of the people's health and remove the causes that menace it, and, as an incident to the execution of this governmental function, make the person who creates, maintains, or permits it to exist liable for the expense. *Balch v. Glenn,* 85 Kan. 735, 119 Pac. 67; *Bangor v. Rowe,* 57 Me. 436; *People v. Casa Co.* 35 Cal. App. 194, 169 Pac. 454.

The trial court held that the interest of the vendee in possession of the land could only be subjected to the lien provided by the statute, and dismissed the claim of the state against the vendor, *Liebenow.* We think the principle declared in *Chicago, M. & St. P. R. Co. v. Janesville,* 137 Wis. 7, 118 N. W. 182, controlling in this case. It is there said:

"A defective sidewalk is a menace to the public safety, and its presence in a public street is quite analogous to the presence of a disease-breeding cesspool upon private property, which under well established principles may be re-

moved by the public authorities and the expense thereof charged to the property, if the statute so authorize."

In *Bangor v. Rowe, supra,* it was held that the owner of the land can be made liable for the expense of removing a nuisance created by a tenant over whom he had no control. In *Balch v. Glenn, supra,* it was held that the statutory method of charging the expense for abatement of the nuisance menacing the public health as a lien upon the land upon which it existed was a proper exercise of the police power and did not invade any constitutional rights of the owner. See cases cited in the opinion. The board of health in the instant case acted as the state's agent to perform the important function of protecting the health of the people. The proceedings to abate the nuisance partake of the nature of a proceeding *in rem.* In the interest of the public generally, all private rights must yield to the public right, and the state may, as it has provided by the statute involved here, subject the private interest in property to the burden of paying the expense to keep such property free from conditions menacing the public health. Such an imposition of the expense for abating a nuisance on the land where it exists and making it a lien on all the interest therein, is proper within the police power and invades no constitutional rights of the owners. It is considered that the statute is valid and that the expense incurred is a lien on all the private interest in the land.

By the Court.—The judgment appealed from is reversed, and the cause remanded with direction to award judgment in accordance with this opinion.

WINSLOW, C. J., and KERWIN and OWEN, JJ., took no part.

WILSON, Appellant, vs. STORK, Respondent.

April 9—June 1, 1920.

Boundaries: Relocating original government surveys: Evidence of long-established boundary lines: Oral agreement to abide by new survey: Effect: Adverse possession.

1. When marks established by the original government survey cannot be found, the location of long-established and recognized physical evidence of boundary lines, as indicated by the maintenance of boundary fences, becomes of value and importance, and cannot be disregarded or set aside either by a surveyor or by a court in determining the true government line.
2. The use by adjoining landowners of land on their respective sides of a fence up to the fence for more than twenty years established title in and to the farms on each side thereof, whether such possession or occupancy by either party went beyond the calls of their respective deeds or not.
3. Under the evidence in this case, an oral agreement by the adjoining landowners to abide by a survey made by a surveyor selected by them necessarily carried with it the implied understanding that the boundary line must be the correct one and be established with something approximating absolute certainty, and should not be construed as an agreement to abide by a line whether right or wrong.

APPEAL from a judgment of the county court of Walworth county: JAY F. LYON, Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *E. T. Cass* of Whitewater, attorney, and *Nolan & Dougherty* of Janesville, of counsel, and for the respondent on that of *Easton Johnson* of Whitewater.

ESCHWEILER, J. This is a line-fence controversy. The trial court in his decision expressed regret that this controversy over a little strip of land of small value was not settled between the parties instead of having been made a matter of legal controversy. We concur most heartily in that view of the situation.

The plaintiff and his father, predecessor in title, since about 1860 were in continuous possession of a farm in section 16 in the town of Richmond, Walworth county, this state. Just south thereof is the farm which has been owned by the defendant since about 1911.

As early as 1860 a fence had been erected and thenceforward maintained on the east end of the eighty rods separating the two farms. Subsequently and more than twenty years preceding the commencement of any trouble between the parties hereto the fence had been completed on the west end, so that for a period of more than twenty years there was a fence along the entire eighty rods marking the limits of occupancy of each farm. A survey had been made by one Tubbs, then county surveyor, more than twenty years prior to 1913, and the line run by him appears to have been substantially along such old fence. Under defendant's own testimony the fence was there at the time he entered into possession of his farm, and since then each of the parties occupied their respective farms up to such fence.

Prior to defendant's occupancy the west forty rods of such fence had been by tacit understanding and acquiescence kept and maintained by plaintiff and his predecessors and the east forty rods by defendant's predecessors.

About the fall of 1913 some conversation was had between the parties with reference to rebuilding this fence, and about February, 1914, the defendant removed the old fence as it then stood on the east forty rods and set several fence posts, one on the east end of the line, and, as he claims, in the hole in which the old fence post had been standing, and another at the center of the eighty rods, some two and one-half feet north of where the old fence had stood. He also placed one or more posts between such east and west posts of his proposed fence line. This new line so proposed to be fenced by him was objected to by the plaintiff.

In the spring of 1914 the supervisors of the town were called in unofficially to suggest the correct line between the

parties so that the fence building might continue. Their proposed line was also to the north of what had been the old fence. This again did not meet the plaintiff's approval, and it was then and there orally agreed between the parties hereto that one William Child, then county surveyor, should be called in to make a survey, each to pay one half of the expense thereof and to abide by the result of such survey. It was substantially agreed between the parties at the time Child made his survey that the west end of the eighty rods was practically as indicated by the fence post which had been placed there by plaintiff, although defendant at times in his testimony and by other evidence contended that such post was placed some eight inches south of the real line, but nevertheless it was accepted as the correct point for the west end and so treated by Mr. Child. The line established by Mr. Child was north of the place where the defendant had replaced the east post line, and at the center thereof was a little north of the post there placed in the preceding February by defendant. The parties paid their respective portions of Mr. Child's bill and he sent a copy of the sketch made by him of the survey to each of the parties, but the plaintiff promptly returned his copy.

There is testimony supporting a finding made by the trial court that at the time Child finished his survey and while the parties were still there, plaintiff expressed satisfaction with such line and directed the defendant to proceed to build his forty rods of fence along such line. It is undisputed, however, that such acquiescence, if any such there was, was but momentary, for immediately upon defendant starting to erect a new fence along the line of Child's survey plaintiff promptly tore it down, and the operation of building and tearing down by the respective parties was repeated at least five times. During that period of construction and destruction defendant tore down a portion of the west end of the fence. Trespasses, counter trespasses, assaults and counter assaults have vividly marked the boundary line since then.

Claims are made by the respective parties for damage to and from each other from such respective trespasses and assaults.

The court found that there had been no trespass by the defendant; that the parties agreed to abide by the boundary line as established by Mr. Child; that his survey then established the true boundary line between the lands of the parties; that there had not been continuous and exclusive possession by plaintiff and his predecessor in title for a period of twenty years to the disputed strip of land lying between the surveyed line of Child and the old fence as it stood before being removed by the defendant in May, 1914; and also awarded to the defendant $60 as the amount of his damages wrongfully sustained over and above the amount of damages wrongfully sustained by the plaintiff, but made no finding as to the amount of each party's respective damages.

Under the evidence in this case we are forced to the conclusion that the determination by the trial court that the parties must be held to the line established by the survey of Mr. Child as locating the true and binding line of demarcation between their respective properties cannot be upheld. The original stake and original landmarks as established by the government survey were not found or located by Mr. Child for the east end of the line in question. He assumed that a black spot found eight to ten inches below the surface was the remains of the point of the old government stake. He assumed that the decayed roots of a stump near there were those of one of the witness trees recorded in the government survey, but made no search to locate the place of the other witness tree, also recorded as to the same corner. He paid no attention in his attempted location of such starting point to the undisputed fact that the fence post at such end of the old fence had stood some distance to the south of his assumed point for more than twenty years prior to the controversy between the parties, and in continuing

his survey of the line he also entirely disregarded the fact of the prior existence of such fence. In the absence of the finding and locating of the marks established by the original government survey, the location of long-established and recognized physical evidence of such boundary lines as indicated by the maintenance of such boundary fences becomes of value and importance and cannot be disregarded or set aside either by the surveyor who seeks to establish the true government line or by a court in determining an issue presented on such subject. *Lawler v. Brennan,* 150 Wis. 115, 141, 134 N. W. 154, 136 N. W. 1058.

The use by the respective parties of the land on their respective sides of the fence up to such fence for more than twenty years prior to the arising of the controversy here might well be considered as establishing by adverse possession title in and to the farms on each side of the fence, whether such possession and occupancy by either party went beyond the calls of their respective deeds or not. The situation here on this point is squarely within the holding of this court in *Clithero v. Fenner,* 122 Wis. 356, 360, 99 N. W. 1027; *Off v. Heinrichs,* 124 Wis. 440, 448, 102 N. W. 904; *Ovig v. Morrison,* 142 Wis. 243, 125 N. W. 449. The same rule is recognized as to public highways. *Vernon v. Nicolai,* 125 Wis. 319, 325, 103 N. W. 1111.

Assuming for the purposes of this case that the oral agreement to abide by the survey of Mr. Child was binding upon the parties, such an agreement would necessarily carry with it the implied understanding that the boundary line must be the correct one and be established with something approximating absolute certainty. It ought not to be construed, under the evidence here, as an agreement to abide by a line established by some selected surveyor whether such line be right or wrong. *Anderson v. Huebel,* 133 Wis. 542, 546, 113 N. W. 975.

It must be held that the defendant was a trespasser in setting his fence posts and stretching his fence upon so much

of plaintiff's premises as lay to the north of the old fence line, and plaintiff is entitled to a judgment in accordance with such holding.

On the question of damages we think it best to dispose of this case by saying that the testimony in the record is not such as will permit the assessing of anything in the way of damages to either party. Plaintiff to have costs here and in the court below.

By the Court.—Judgment reversed, with directions to enter judgment in accordance with this opinion.

KRUEGER and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

April 12—June 1, 1920.

Homicide: United States marshal serving warrants for draft evaders: Evidence sufficient to sustain conviction of murder: Submission of lesser degrees to jury: Officer killing person resisting arrest: Killing of member of posse: Criminal law: Change of venue: Discretion of court: Accessory before the fact: Aiders and abettors: Harmless error: Evidence: Indictment and information.

1. In a prosecution of draft evaders for murder committed while resisting arrest, the circumstantial evidence is *held* sufficient to warrant a verdict of guilty as against one of them, although there was no direct evidence that he personally did any shooting or aided and abetted therein.
2. The disposition of a motion for change of venue on account of the prejudice of the people of the county necessarily rests largely in the discretion of the trial court, and its action is not to be reversed in the absence of abuse.
3. The admission in evidence of shoes worn by a witness who was shot a number of times during the affray, which shoes had bullet holes in them, is *held* not error as tending to prejudice the jury, in view of the testimony of the witness and a statement of the court in receiving the evidence that it was admitted only to show the direction from which the shots came.

4. Failure of the trial court to submit the question of whether or not defendants were guilty of murder in the second degree or manslaughter in the third degree, is *held* proper in view of a showing that the shooting was deliberate.
5. One who is charged simply as principal cannot be convicted as an accessory before the fact; but an erroneous instruction as to the guilt of an accessory before the fact is not prejudicial in the absence of evidence tending to show that either defendant was an accessory.
6. An accessory before the fact is one whose will contributes to a felony committed by another as principal while he himself is too far away to aid in the felonious act: one who was not present, actually or constructively, at the time a felony was committed, but who counseled, procured, or commanded another to commit it.
7. Those present assisting one who personally commits a felony are aiders and abettors and are guilty as principals.
8. Where a deputy United States marshal held warrants for the arrest of draft evaders, though their offense was only a misdemeanor under the federal statutes, when they resisted arrest with force of arms to the point of taking life the marshal had a right to overcome such resistance, and any taking of life necessary to do so constituted justifiable homicide under sec. 4366, Stats.
9. Where the deputy marshal, while attempting to serve such warrants, called for assistance by messengers to a village, one who responded, though not specifically called to the assistance of the marshal in person, had the status of an officer, and the killing of him by the draft evaders was murder.

ERROR to review a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Caroline, *Frank,* and *Leslie Krueger,* hereinafter referred to as the defendants, were informed against and tried for the crime of murder of Harry Jensen in the circuit court for Clark county. Caroline was acquitted, *Frank* and *Leslie Krueger* were found guilty of murder in the first degree and sentenced to life imprisonment. To review the judgment of conviction the defendants *Frank* and *Leslie Krueger* bring this appeal.

For the plaintiffs in error there was a brief by *Kaftan & Reynolds* of Green Bay, and oral argument by *John Reynolds.*

For the defendant in error there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *Frank Jackson,* district attorney of Clark county; and the cause was argued orally by *Mr. Messerschmidt* and *Mr. Jackson.*

OWEN, J. The Krueger family, consisting of Caroline Krueger, the widowed mother, and her sons *Frank,* Ennis, Louis, and *Leslie,* lived on a farm in Clark county, Wisconsin, about two and one-half miles from the village of Owen. The two sons *Leslie* and Louis were within the draft age and duly registered as required by the United States statutes. Louis Krueger was ordered to Neillsville for physical examination on February 2, 1918, but failed to appear, and up to September 14, 1918, had not appeared in response to the order. *Leslie* took his physical examination as required, and on the 5th day of June, 1918, was cited to be at Neillsville on the 24th day of June to entrain for military service. He never appeared. Under the compulsory military service laws of the United States it became the duty of *Frank* and Ennis to register on the 12th day of September, 1918. They failed to register.

In due course warrants were issued for the arrest of *Frank* and Ennis Krueger charging them with failing to register, and placed in the hands of Joseph Gans, deputy United States marshal, for service. On the 14th day of September, 1918, he and C. E. Marks, a special agent of the bureau of investigation of the department of justice of the federal government, went to the village of Owen and, in company with Peter Rasmusson, village marshal, proceeded to the Krueger farm in an automobile driven by one Kidd, for the purpose of serving said warrants. They went to the house and inquired of Mrs. Krueger where the boys were and were told that they were in the cornfield. They proceeded back along the highway, a distance of sixty or eighty rods, and observed *Frank* and Ennis working in the corn-

field a short distance from the highway. They stopped the automobile and Gans, Marks, and Rasmusson got out and went to the fence. Gans called to *Frank Krueger,* who was about one hundred feet from the fence, and said: "Come here. I want to speak to you." *Frank* said: "If you want to speak to me, speak from right where you are." Gans said: "I am the United States marshal and have a warrant for you; come over here, I want to talk with you." Ennis Krueger then opened fire on the officers, and an exchange of numerous shots between the Kruegers and the officers followed. The Kruegers fired seven or eight shots at the officers, one of which cut the coat of Marks on his shoulder. The Kruegers retreated in a zigzag course toward the Krueger house, keeping up the fusilade as they retired. Gans then told Kidd and Rasmusson to go to the village of Owen to get more ammunition and help. Gans and Marks went to the house of one Vater, just across the road from where the shooting occurred, and while they were standing in Vater's yard talking to him bullets whistled in their close proximity and they saw two men standing in the highway in front of the Krueger house shooting at them with rifles. At least five or six shots were fired at that time. Marks and Gans then went to Withee, called up the United States marshal's office at Eau Claire, informed him of what had happened, and the marshal instructed them to get help and serve the warrants. Shortly, Rasmusson returned from Owen with four or five men, and sent them east across the field north of the house, the idea being for them to reach the woods east of the field and make their way down to the sawmill east of the Krueger residence to prevent the Kruegers' escape in that direction. While going across the field these men were fired upon from the Krueger barn. Of this party, one White was hit twice, and another, Emil Laneo, was hit nine times. The bullets came from the direction of the Krueger barn. Reinforcements that Gans had secured at Withee then began to arrive on the scene, as well as further

volunteers from Owen. These men gathered in the highway south of the Vater house and from forty to sixty rods north of the Krueger house. They were fired upon from the Krueger premises, and the deceased, Harry Jensen, was there killed, and another man by the name of Page was hit. The posse opened fire on the Krueger premises, and upwards of 150 bullets penetrated the Krueger residence. Mrs. Krueger finally surrendered and later *Frank,* seriously wounded, also surrendered. *Leslie* and Ennis made their escape from the premises that night, but *Leslie* was later arrested upon the charge of murder of said Harry Jensen. Upon the trial Caroline Krueger was acquitted and *Frank* and *Leslie* were convicted of murder in the first degree.

In behalf of *Leslie* it is contended that there is no evidence warranting his conviction. There is plenty of evidence that he was around the barn or house from which the shooting on the part of the Kruegers took place. There is no direct evidence that he personally did any shooting or that he aided and abetted therein. The evidence in this respect is circumstantial, but in our judgment entirely sufficient to warrant the verdict of the jury.

It is plain that the entire family resented the draft and had no disposition to comply with the compulsory military service act. While Louis and *Leslie* registered, Louis failed to report for physical examination and *Leslie* failed to report for entraining. To all intents and purposes, therefore, they were deserters from the army and fugitives from justice. *Leslie* hung around the Krueger premises after his failure to report for entraining, and, in the language of *Frank,* "stayed in the barn daytimes and bummed around nights."

Harry Hewett, a witness for the state, testified:

"I talked to *Leslie Krueger* in the latter part of October or the first part of November, 1918. *Leslie Krueger* told me he was there on the 14th of September. He said he was up in the barn when the automobile first came there. He

said he saw the shooting in the cornfield, and he said that the United States marshals did the first shooting and said he was absolutely sure they did. He did not say that he stayed on the place all day, but he told me about the time he left, just a short time after nightfall after dark set in. He said that he left the place at nightfall, just shortly after his brother *Frank* was taken out of the place by Vater. He said that Ennis and him left together and that he had his revolver in his hands. He said that the fellow he met didn't pay any attention to him and it was a good thing for him he didn't, for if he had he would have been a dead one."

This evidence was not denied. This plainly reveals *Leslie's* attitude. He was hostile to the idea of compulsory military service and evidently was resolved not to submit thereto. He left the place at nightfall with his revolver in his hands. "The fellow he met didn't pay any attention to him and it was a good thing for him he didn't, for if he had he would have been a dead one." With this revelation of his character and disposition it is not difficult to believe that he joined with his brothers in fighting off the United States marshals, and but slight evidence of his participation is required to justify a verdict of guilty.

While the evidence is clear that the marshal's posse was met with a fusilade from the Krueger premises, it is said that there is no evidence to connect *Leslie* therewith. Let us see. *Frank Krueger* gives a detailed statement of his movements from the time he left the cornfield until he surrendered, and at no time does he locate himself in the barn. He says that he was either in the house or outside of the house, near the windmill and a threshing separator. Numerous witnesses for the state testified that during the affray they saw one man a considerable portion of the time in the yard, around and about the house. It may be assumed, therefore, not only from the testimony of the state's witnesses, but by the admissions of *Frank,* that he was not in the barn. If, therefore, two men were shooting from the barn, the testimony of *Frank* shows that he was not one of

them. The only other men on the premises were *Leslie* and Ennis, and if two men were shooting from the barn *Leslie* must have been one of them.

Frank Giffin was one of the party who crossed the field going from the highway to the woods on the east side of the field. He testified as follows:

"*Q.* Did you see any persons around the Krueger buildings? *A.* Not until after we had seen them shoot out of the barn door, the north door towards Vater's.

"*Q.* Who did you see in the barn door? *A.* I can't tell. I didn't see them myself. I seen the smoke from the guns, but I couldn't see the men.

"*Q.* When did you do the shooting? *A.* After we see them shooting out of the north door of the barn towards Vater's.

"*Q.* How did these shots sound that came from the Krueger premises? *A.* I heard two shots, two bullets, very distinctly, and one of them made a sharp s-s-s-s and the next one sounded z-z-z-z.

"*Q.* Could you tell by the sound whether there was more than one rifle being used or not? *A.* It sounded like a low-power gun and a high-power gun. That is what it sounded like."

This justifies the conclusion that two men were shooting from the barn and, if there were two, *Leslie* must have been one of them. Now if, in addition to this testimony, we can find that there were three rifles on the premises, the conclusion is strengthened.

C. J. Good, a witness for the state, testified that he had a talk with *Frank Krueger* at the hospital at Chippewa Falls on the 21st day of September, 1918. He further testified as follows:

"I asked him about what guns they had up there and he said they all had guns. I think he said that he and *Leslie* had 35 automatics. Ennis had a high-power gun, a 45 Colt's automatic, and Louis had a 32 automatic."

Frank Krueger, in his testimony, partially denied having this conversation with Mr. Good, in the following equivocal

and evasive manner, as appears from these questions and answers in his testimony:

"*Q.* And *Leslie* had a rifle, didn't he? *A.* No, he didn't.

"*Q.* Well, how many rifles did you have on the premises? *A.* Two.

"*Q.* Didn't you tell Mr. Good that you had a rifle and Ennis had a rifle and *Leslie* had a rifle? *A.* I don't remember.

"*Q.* Well, if you did tell him that, was that the fact? *A.* It was a fact that Ennis and I had a rifle, yes.

"*Q.* Well, *Leslie* had a rifle also, didn't he? *A.* I don't know.

"*Q.* Were there not three rifles around your place? *A.* Yes, there was an old one in the basement, but it was no good.

"*Q.* But didn't you have three high-power rifles on your premises last summer? *A.* We only had two that I know of.

"*Q.* Didn't you tell Mr. Good that you had three? *A.* I don't remember what I told Mr. Good.

"*Q.* Didn't you tell Mr. Good that you had a 35 Remington automatic? *A.* I don't remember very closely what I told Mr. Good because I was in pain at that time.

"*Q.* Well, did you have a 35 Remington automatic? *A.* I did.

"*Q.* Did you tell Mr. Good that *Leslie* had a 35 Remington automatic? *A.* I don't know as I did. I told you I didn't remember. I was in pain the first evening.

"*Q.* Isn't it a fact that *Leslie* did have a 35 Remington automatic? *A.* I don't remember.

"*Q.* Do you know whether or not *Leslie* ever had a 35 Remington rifle? *A.* Do I remember whether he had one?

"*Q.* Yes, did he own one? *A.* He has had one in his hands, yes, he used mine.

"*Q.* Well, but did you own one and did he own one? You know what I mean. *A.* I don't remember. No, he didn't."

This testimony of *Frank Krueger* that *Leslie* did not own a rifle is far from satisfactory and is not of that straightforward and positive character that carries conviction.

Taken in connection with the testimony of Mr. Good it was not at all unreasonable for the jury to disbelieve *Frank's* testimony with reference to the number of rifles present on the premises.

We have then these brothers, all of whom were attempting to evade the draft; all of whom had refused to comply with the requirements of the federal statutes in that respect; *Leslie* had been a fugitive for more than two months, remaining at the Krueger home, but hiding in the barn during the daytime; the family was well equipped with firearms and, as the testimony shows, had laid in a good supply of ammunition during the summer. The conclusion is almost irresistible that *Leslie* was in entire sympathy with the resistance made by Ennis and *Frank* to the United States marshals when they came there to cause their arrest. That he had no compunction about killing is revealed by the admission he made to Hewett, which is undenied. That the affray could take place there that afternoon and *Leslie* remain passive, neither aiding nor abetting his brothers in their resistance, seems highly improbable. In addition there was evidence from which the jury could very reasonably conclude that there were sufficient rifles to arm all three, and that *Leslie* and Ennis did the shooting at the crowd from the barn. We feel that the verdict finding *Leslie* guilty is not only sufficiently, but very satisfactorily, sustained by the evidence, and that his conviction should not be disturbed upon the ground that it is not so supported.

We come now to the consideration of various alleged errors occurring during the trial. The first in order discussed in defendants' brief is that the court erred in not granting their motion for a change of venue from Clark county on account of the prejudice of the people. There were twenty-three affidavits made and filed with the court in support of the motion. Thirteen of these affidavits were stereotyped and set out in considerable detail the reasons justifying the conclusions of affiant that the defendants

could not have a fair trial in Clark county. The other ten were individual affidavits which, with one or two exceptions, were of a much more conservative nature. In opposition to the motion the state filed upwards of fifty affidavits, made by citizens of Clark county, principally stereotyped, to the effect that in the belief of affiant defendants could have a fair trial in Clark county and that the citizens of adjoining counties were apt to have as much knowledge or information concerning the affair as did the citizens of Clark county, for the reason that the details thereof were widely and extensively published in papers having a general state circulation, and that the people of the state generally had the same information as to what occurred at the Krueger farm as do ninety-five per cent. of the people of Clark county. Manifestly, if the motion were to be decided in accordance with the preponderance of the number of affidavits, it was correctly decided, and in *Perrin v. State,* 81 Wis. 135, 50 N. W. 516, it was said, "no error can be predicated on the refusal to change the venue, as there seems to have been substantially as strong a showing on the part of the state as on the part of the defendant." However, we desire to emphasize the fact that the disposition of a motion for a change of venue on account of the prejudice of the people necessarily rests very largely in the discretion of the trial court and its action thereon is not to be reversed in the absence of an abuse of such discretion. *State ex rel. Carpenter v. Backus,* 165 Wis. 179, 161 N. W. 759.

The difficulty of impressing upon the record a true concept of the public sentiment in the county is manifest. Just as the trial judge is in a better position to weigh the testimony of witnesses who appear before him, so is he in a better position to judge of the public sentiment of the county. He is on the ground and in a position to sense, in a way that this court cannot, the true sentiment of the community and to judge much more correctly whether it is such as to prevent a fair trial on the part of the defendants.

This is especially true in the instant case, where the trial judge was a resident of Clark county and had an opportunity of acquiring an instinctive knowledge of the situation which cannot be preserved in the record, for which reason his opinion should be accorded great weight. In the instant case the prophecies of those who deposed that the defendants could not have a fair trial in Clark county were somewhat discredited by the fact that Caroline Krueger was acquitted and that several peremptory challenges on the part of the defendants were not used in securing the jury. In *Bianchi v. State,* 169 Wis. 75, 171 N. W. 639, it was said that "the apparent difficulty or ease of securing a jury may be taken into account in passing upon an alleged abuse of discretion in refusing a change of venue." We do not mean to infer that a fair trial consists in an impartial jury alone. It may be possible to secure a jury who never heard of the case in a county where the sentiment crystallized in the court room is so tense and public feeling runs so high that knowledge thereof cannot be kept from the jury. Under such circumstances the impossibility of a fair trial may exist even though an impartial jury be secured. A fair trial includes, as well as an impartial jury, a trial in an atmosphere and under conditions assuring a verdict upon the evidence and not upon a public sentiment from the influence of which the jury cannot be kept entirely free. In view of the broad discretion reposed in trial courts in this respect we are prompted to say that it is not a discretion to be either grudgingly or too liberally exercised. The statute authorizing the change in the place of trial was passed in furtherance of the constitutional provision (sec. 7, art. I) providing safeguards for accused persons. The law should be administered with wisdom and consideration commensurate with the responsibility reposed in trial courts, to the end that the spirit prompting the enactment may be effectually carried out. What has been said abundantly forecasts our conclusion that in the instant case we find no abuse

of discretion on the part of the trial court in denying the motion.

Defendants next complain because the shoe of the witness Laneo, who was shot nine times in going from the highway to the woods on the east of the field, was introduced in evidence and exhibited to the jury. The witness was permitted to testify without objection to his adventures in crossing the field, to the fact that he received nine bullet wounds and the location of such wounds upon his body. He testified that the bullets that struck him came from the direction of the Krueger farm. He described the position in which he was lying at the time—his feet toward the Krueger barn. His shoes were produced showing bullet holes in them, admitted in evidence and exhibited to the jury. The admission of the shoes in evidence was strenuously objected to by the defendants because, it was asserted, their exhibition tended to prejudice the jury, in response to which the court stated:

"The court understands counsel is offering this evidence for the purpose of showing the direction from which the shots came. The court is receiving this evidence for that purpose, if it does tend to prove it, and the jury will receive it for that purpose. The objection is overruled."

In the first place we cannot see how the exhibition of the shoes could tend to prejudice the jury. The witness was testifying freely to his wounds received by reason of bullets coming from the Krueger barn, and the exhibition of the shoes could add nothing to his testimony to the effect that he received such wounds. The shoes did furnish ocular proof of the course of the bullets which penetrated his feet and, assuming his testimony with reference to the position in which he was lying to be correct, tended to corroborate the statement that the bullets came from the Krueger premises. We see no error in the admission of the shoes in evidence.

The next contention is that the court erred in not submitting to the jury the question of whether or not the de-

fendants were guilty of murder in the second degree or of manslaughter in the third degree. We shall spend very little time upon this assignment of error. Taking the evidence as a whole, there is no room for the conclusion that the defendants fired into the crowd with no premeditated design to kill, or that it evinced at the most a depraved mind regardless of human life constituting second-degree murder, or that the shooting was done in the heat of passion without a design to effect death, constituting manslaughter in the third degree. There was ample time for the defendants to meditate, and that they deliberately shot to kill is the only reasonable conclusion to be drawn from all the evidence. They were conscious of guilt. They knew that they had failed to register in compliance with the federal statutes; that they anticipated arrest or an attempted arrest is a natural inference. They bore arms while engaged in the peaceful occupation of husbandry, and opened fire on the officers while a fence yet separated them and before any overt act on the part of the officers to bring them into subjection. They fired at the officers while they stood in Vater's yard. They fired upon and wounded the men who crossed the field to the woods upon the east. They fired upon the posse when Jensen was killed. In all this the evidence overwhelmingly shows they were the aggressors. They were in no danger of the least physical injury if they but did what the law required of them, namely, submit to arrest. This they could have done at any time in perfect safety. But their conduct was in resistance of arrest, in defiance of the law, and manifested from start to finish a clear purpose on their part to shoot to kill after ample opportunity for meditation and deliberation. Even if we should accept the testimony of *Frank* and all the testimony given in behalf of the defendants, there would be no room for the contention that the evidence would sustain a verdict for murder in the second degree or manslaughter in the third degree.

In its charge the court used the following or similar language a number of times:

"In such case if the other defendants aided in the commission of such offense, *or was accessory thereto before the fact by counseling, aiding, or otherwise procuring the same to be committed,* then in such case such other defendants are equally guilty with the principal felon and are to be punished in the same manner."

As none of the defendants were charged in the information as accessories before the fact, it is contended that this and similar language used in the charge constituted prejudicial error. That it was not a correct statement of the law is established by *Karakutza v. State,* 163 Wis. 293, 156 N. W. 965, where it is held that one who is charged simply as principal cannot be convicted as an accessory before the fact, as the two offenses are separate and distinct crimes. We do not think the error was prejudicial, however, because there was no evidence in the case tending to show that either of the defendants was an accessory before the fact. An accessory before the fact is one whose will contributes to a felony committed by another as principal while himself too far away to aid in the felonious act. Bishop, New Crim. Law, § 673. An accessory before the fact is one who was not present actually or constructively at the time when a felony was committed, but who counseled, procured, or commanded another to commit it. It is essential that the person charged as an accessory before the fact should have been absent at the time of the commission of the crime, otherwise he is a principal in the second degree and not an accessory. 16 Corp. Jur. 134. Those present assisting one who personally commits the offense are aiders and abettors and are guilty as principals. *Vogel v. State,* 138 Wis. 315, 332, 119 N. W. 190. There is no contention that this crime was committed in the absence of either *Frank* or *Leslie.* Hence they could not be accessories before the fact. Both being present, if they aided, counseled, or pro-

cured the commission of the crime they were aiders and abettors and could be convicted as principals. In *Vogel v. State, supra,* it was said of a similar charge:

"There was no evidence tending to show that any person was guilty as an accessory before the fact, as defined above, and no testimony to which this part of the instruction could apply, if it were intended to reach absentees who counseled the commission of the offense."

In the instant case the court made no attempt to define an accessory before the fact, and, as there was no evidence that any one to whom it could apply was absent, the jury must have understood the language "counseling, aiding, or otherwise procuring the same to be committed" as applying to those who were present, in which case they were aiders and abettors and could be convicted as principals, and they could not have been misled by the language used.

The court instructed the jury to the effect that the warrants in the hands of the deputy United States marshal were valid warrants and vested the deputy marshal with full and complete power to arrest the persons named therein and to use such force as was reasonably necessary to secure and detain them and overcome their resistance and protect the marshal or deputy from bodily harm; referred to the legal duty of the deputy marshal to serve the warrants, and that by sec. 788 of the United States Revised Statutes the marshals and their deputies shall have in each state the same powers in executing the laws of the United States as their sheriffs and their deputies in such state may have by law in executing the laws thereof; that by the laws of this state sheriffs and their deputies, in the apprehending or securing of any person for felony or breach of the peace, may call on such persons or invoke the power of their county as they may deem necessary, and said that "this expression, 'power of their county,' means the same thing as posse or citizens of the county summoned to aid in the execution of process;" referred to sec. 4366 of the statutes of the state, where it is

provided that homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance in overcoming actual resistance to the execution of some legal process, and told the jury that "if the persons named in the warrants resisted arrest and resorted to the use of firearms against the marshal, he had the right to use firearms against them also and to shoot and even kill them if that became necessary to capture them and execute the writ and mandate in the marshal's hands;" referred to sec. 4489 of the Wisconsin Statutes, providing a penalty for resisting a sheriff or deputy sheriff while engaged in the lawful execution of any criminal process, and said:

"The officer having made known his official position and that he had a warrant for the arrest of the accused, the citizen's duty is to quietly submit and appear before the magistrate or court and there make his defense. He ought not to take the law into his own hands and unlawfully resist."

The court refused to charge the jury, as requested, that the crime upon which the warrants in the hands of the deputy marshal were issued, to wit, the failure to register, was a misdemeanor, and that "except in self-defense an officer has no right to proceed to the extremity of shooting people in resisting or preventing the escape of one whom he has arrested for an offense less than a felony, even though the offender cannot be taken otherwise." The court also refused to instruct the jury as follows: "That no person who has not been duly summoned to aid an officer has a right to participate in an attempted arrest." It is claimed that the court erred in charging the jury as above indicated and in refusing to charge as thus requested.

This brings up the general subject of the power and duty of an officer situated as was the deputy United States marshal, and those called to his assistance, which we will briefly discuss. It is claimed, in the first place, that because the offense committed by *Frank* and Ennis, upon which the war-

rants were issued, is by the federal statutes made a misdemeanor, the officers and those called to their assistance had no authority to go to the extremity of killing in order to apprehend the persons named therein, and the case of *Gosczinski v. Carlson,* 157 Wis. 551, 147 N. W. 1018, is cited to our attention. That case is authority for the proposition that an officer may not take the life of one whom he is attempting to arrest upon a warrant charging him with a mere misdemeanor. That principle, however, has no application here. While in order to apprehend the person charged with a misdemeanor only an officer may not take the life of the person so charged, it does not follow by any means that any resistance offered to the arrest may not be overcome to the extent of taking life, if that be necessary to overcome the resistance. In this case it was the duty of the deputy United States marshal to serve these warrants. While he would not have been justified in shooting in order to prevent their escape had they taken flight, he was by no means compelled to abandon his efforts because they commenced firing upon him. It was not only his privilege but his duty to overcome such resistance, and the taking of life necessary to do so constitutes justifiable homicide under sec. 4366, Stats.

But it is argued that the deceased was not thus protected because he had not been specifically called to the assistance of the deputy marshal. One very effectual answer to this proposition is that, whether or not he was acting under the command and in assistance of the deputy marshal, the Kruegers had no right whatever to shoot him. He was in the public highway, where he had a right to be. He had not shot at the Krueger premises and there is no pretense that he was killed in self-defense. But the contention that he was not acting in the assistance of the deputy marshal cannot be sustained. There is no requirement of the law that in order to enjoy the immunity and protection accorded to

an officer under such circumstances a citizen must be formally and specifically called to the assistance of the officer, or that he be specially commissioned or sworn in in that capacity. In the very nature of things a call for assistance on the part of the sheriff or other officer cannot always be addressed with discrimination and to specific individuals. The call generally comes when the sheriff is hard-pressed. It may be in the nature of a cry of despair or a bugle call to arms, calling upon all who may hear it, or be advised of it, to rally to the assistance of the officer endeavoring to serve legal process and thus to maintain the majesty of the law. Under such circumstances there is a duty resting on all citizens who know of the call to go to the relief of the officer, even though failure to perform the same does not constitute an offense under sec. 4488, Stats. It is a moral duty incident to citizenship, even though under the circumstances a conviction for failure to perform the same could not be had under sec. 4488. In this case Rasmusson was sent to Owen for help. Gans and Marks went to Withee to secure help. They called upon persons indiscriminately, who in turn passed the call along to others, to rally at the Krueger farm, and in response to this a posse of considerable proportion there assembled. We hold that all who were there, constituting the posse, lending assistance to the deputy United States marshal in the apprehension of those for whom he held warrants, were acting under his direction and command, constructively at least, and were entitled to the same protection and immunity extended to the deputy marshal himself. From this it follows that there was no error on the part of the court in charging as above indicated or in refusing to give the instructions requested as above specified.

Exceptions are also taken to numerous remarks of counsel for the state in their addresses to the jury. No useful purpose will be subserved by a detailed statement of such re-

marks and by an extended treatment of these assignments of error. We have given them our careful attention and reached the conclusion that they do not constitute prejudicial error.

By the Court.—Judgment affirmed.

DARGERT, Respondent, vs. DIETRICH and others, Appellants.

May 4—June 1, 1920.

Drains: Removal of obstructions: Damages caused by permitting obstruction: Who may maintain action.

The relief afforded by secs. 1384, 1386, Stats., for the removal of obstructions in a drainage ditch by an adjacent owner, being penal and not compensatory, was not intended to take the place of an action for damages; and since sec. 1382 requires such owner to maintain and keep in repair the portion of the ditch assigned to him, and it is also obvious that the statutory remedy might fail to prevent damage, which might come before termination of the proceedings, damages may be recovered from an adjacent owner for an obstruction without first invoking the statutory remedy.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action begun in the civil court of Milwaukee county to recover damages to a crop of growing vegetables caused by water flooding plaintiff's land by reason of defendants' negligence in not cleaning out the Kinnickinnic drainage ditch through or adjacent to their lands, they being lower riparian proprietors. The Kinnickinnic drainage ditch was a part of the drainage system of plaintiff's land.

The jury found (1) plaintiff's vegetables were damaged on or about September 15, 1912, and thereafter by the presence of water standing on the north five acres of his land; (2, 3) the defendants *Louis Dietrich, Henry Otto, William Flamm, Wilhelmina Winger, Louis Soergel,* and

William Hedke were guilty of a want of ordinary care in failing to remove the weeds from that portion of the Kinnickinnic ditch passing through or abutting upon their respective lands previous to September 15, 1912; (4) such want of ordinary care in failing to remove the weeds from the Kinnickinnic ditch caused the water to back upon plaintiff's land on or about September 15, 1912, and subsequent thereto; (5) such backing of water on plaintiff's land caused the whole damage to plaintiff's vegetables; (6) such want of ordinary care in failing to remove the weeds from the Kinnickinnic ditch was the proximate cause of plaintiff's damages; (7) plaintiff was not guilty of any want of ordinary care which proximately contributed to the damage to his vegetables; and (8) damages in the sum of $610. The trial court gave plaintiff the option to take judgment for $490 and costs or a new trial. Plaintiff elected to take judgment for $490 and costs, and from a judgment so entered the above named defendants appealed to the circuit court, where the judgment of the trial court was affirmed, and from such judgment of affirmance said defendants appealed.

F. X. Boden of Milwaukee, for the appellants.

For the respondent there was a brief by *Harold Metcalf* and *Herbert R. Manger,* both of Milwaukee, and oral argument by *Mr. Manger.*

VINJE, J. The defendants claim plaintiff is not entitled to recover damages because (1) he did not invoke the statutory remedy afforded by secs. 1384 and 1386, Stats., for the removal of obstructions in the drainage ditch; and (2) because of a failure of proof of defendants' negligence and of damages to the extent allowed by the judgment.

The first defense was raised by a plea in abatement. The sections referred to provide a remedy for keeping a drainage ditch free from obstructions, but a failure to comply with the orders which the sections authorize subjects the

defaulting party to a penalty. They give no relief by way of damages to one who suffers injury by reason of such obstructions. The relief afforded by the statute is penal and not compensatory. It was not intended to precede or take the place of an action for damages. Besides, since sec. 1382 places the duty to maintain and keep in repair that portion of a drainage ditch assigned to him, an action under the statute is not required in order to render him liable in damages for a failure to fulfil such duty. The statute casts it upon him, and he cannot escape the consequences of his neglect by saying you should have compelled me by a penal action to perform that which it was my duty to perform in the first instance. It is also obvious that the statutory remedy, if seasonably invoked, might fail to prevent just such damage as that complained of here, for the damage might come before the termination of the proceedings.

We have examined the evidence in relation to defendants' negligence and the amount of damages awarded by the judgment, with the result that there is sufficient basis therein for both findings as modified by the civil court and approved by the circuit court.

By the Court.—Judgment affirmed.

KENTUCKY FINANCE CORPORATION, Appellant, vs. PARAMOUNT AUTO EXCHANGE CORPORATION, imp., Respondent.

May 4—June 1, 1920.

Adverse examination: Constitutional law: Validity of statute requiring nonresidents to submit to examination: Place of examination: Notice and subpœna: Foreign corporations: Control by court.

1. The first ten amendments to the United States constitution do not apply to the state governments, but only to the federal government itself.

2. Sub. 7, sec. 4096, Stats., permitting the adverse examination of an officer of a foreign corporation bringing an action in this state, and sub. 2, sec. 4097, permitting the dismissal of the action for refusal to be examined and to produce papers, do not violate the due process and equal protection of the law clauses of the Fourteenth amendment to the United States constitution.
3. An officer of a foreign corporation required by order of court to be adversely examined and to produce papers under sub. 7, sec. 4096, cannot complain that his examination is being fixed at a place within some other county than that of his residence, he having no residence in the state, nor that he has not been served with subpœna within some county of the state, sub. 6 of such section being cumulative merely and not intended to be the exclusive remedy for any examination of a nonresident.
4. Where a nonresident corporation comes voluntarily into this state to seek the remedies afforded by its courts as plaintiff against a defendant resident, it must submit to reasonable orders within the proper exercise of judicial discretion requiring it to produce documentary evidence or its officers to submit to oral examination within the jurisdiction of the court; and in the absence of a showing that such orders are made without notice to the plaintiff and an opportunity on its part to be heard, or that they are arbitrary or oppressive and require the plaintiff to do that which is beyond its power or ability to do, they will be upheld.

APPEAL from orders of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Plaintiff is a corporation organized under the laws of and existing and doing business in the state of Kentucky. Defendant corporation is of Wisconsin.

Plaintiff instituted in the circuit court for Milwaukee county a replevin action based upon allegations to the effect that it was the owner of and lawfully entitled to a certain automobile. That about July 1, 1918, at the city of Louisville, Kentucky, the defendant C. H. Allen wrongfully took the said automobile from plaintiff's possession and unlawfully and fraudulently absconded with the same and brought it to the city of Milwaukee; that a few days thereafter the defendant Allen unlawfully and fraudulently delivered the

automobile to the defendant corporation, which still holds the same.

The defendant Allen is in default. The defendant corporation appearing in said action, within due time moved the court for an order requiring one Boswell, at the time of the alleged conversion of the automobile and at the time of the motion secretary of the plaintiff corporation, to submit to an adverse examination and to produce papers, books, records, and matters in his possession as such secretary or under his control pertaining to the matters relevant to the controversy, and pursuant to sub. 7, sec. 4096, Stats. Notice of the application for such order was duly served upon plaintiff's attorneys and the matter heard before said court, at which time the plaintiff appeared in open court through its attorneys, and for itself and for its said secretary, Boswell, consented to an examination of said Boswell pursuant to the terms and provisions of the said statute, but at the city of Louisville, Kentucky, the residence of said corporation and of said Boswell, before any officer at any time which might be designated by the court.

An order was then made fixing a time and place within the city of Milwaukee for the examination of said Boswell as said secretary and requiring his attendance to submit to such examination and to have with him all papers, books, records, etc., in his possession or under his control as such secretary relevant to the controversy. The order further required that the defendant should, five days before the time set for the hearing, pay to plaintiff's attorneys Boswell's fare from the southern state line of Wisconsin to Milwaukee and return and the sum of $1.50 as witness fees.

At the time fixed for such examination said Boswell failed to appear and no appearance was made at said time by the plaintiff, its attorneys having theretofore notified defendant's attorneys that Mr. Boswell would not appear at such hearing in Milwaukee.

Thereupon, upon further showing to the circuit court by

report from the court commissioner, an application was duly made to the circuit court by defendant for an order striking out the plaintiff's complaint and dismissing the cause of action with costs. On the hearing of such application appearance was made on behalf of both parties and an order entered striking plaintiff's complaint from the files and dismissing plaintiff's cause of action, with costs. From both of such orders plaintiff has appealed.

For the appellant there were briefs by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Albert K. Stebbins,* of counsel, all of Milwaukee, and oral argument by *Mr. Stebbins.*

For the respondent there was a brief by *Doerfler, Bender & McIntyre* of Milwaukee, and oral argument by *Christian Doerfler.*

ESCHWEILER, J. Defendant justifies the order requiring plaintiff's secretary, a resident of Louisville in the state of Kentucky, under the laws of which state the plaintiff corporation was organized and doing business, to appear for examination at Milwaukee and to produce plaintiff's books and papers, as being a proper exercise of the power vested in the trial court under the provisions of sub. 7, sec. 4096, Stats., which reads as follows:

"In case a foreign corporation is a party, the examination of its president, secretary, other principal officer, assignor or agent or employee, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and

submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpœna."

The second order appealed from, which struck out plaintiff's complaint and dismissed his action for default in compliance with the preceding order, is claimed to be justified under the provisions of sub. 2, sec. 4097, Stats., which reads as follows:

"2. If any officer, agent, or employee, or any person who was such officer, agent, or employee of a foreign corporation, at the time of the occurrence of the facts made the subject of the examination, be lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall neglect or refuse so to do; or, if such person, when lawfully required, shall refuse and neglect to have with him any papers, books, files, records, things, and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court, the pleading of such foreign corporation stricken out, and judgment given against it as upon default or failure of proof."

Plaintiff contends, first, that the said orders constituted an abuse of judicial discretion; and secondly, that each of the statutes above quoted is unconstitutional in that they violate the Fifth and Fourteenth amendments to the United States constitution.

The first objection is not insisted upon in this court, the parties being desirous of having a determination upon the second point.

The plaintiff cannot rely upon a claim that any such right as here asserted is secured to it under the Fifth amendment to the United States constitution. The first ten amendments to the United States constitution do not apply to state governments but only to the federal government itself. *Minnesota & St. L. R. Co. v. Bombolis,* 241 U. S. 211, 217, 36 Sup. Ct. 595.

The clause in the Fourteenth amendment to the federal constitution invoked by appellant on this appeal, reads, so far as material here, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant's contention is mainly directed to one proposition, and that is to the effect that there is no constitutional power within the circuit court to strike out plaintiff's complaint and dismiss its action for a default on its part to comply or cause a compliance with an order which directs a nonresident individual, as officer of a nonresident corporation, to appear and submit to an examination and bring its records and papers within the jurisdiction of the state wherein such foreign corporation has commenced an action in such state court against a resident of such state. That to strike out the complaint and dismiss the action is in effect to deny such nonresident corporation the right to prosecute such action, and in effect denies it equal protection under the law and denies it equality to so litigate on the same footing as may Wisconsin residents, and therefore denies plaintiff the equality guaranteed to it by the federal constitution.

Statutory provisions have long been established in this state, and this court has upheld them, granting power to the circuit court by the striking out of pleadings and directing the entry of an appropriate judgment thereafter for defaults by such party in complying with some statutory duty or some order of such court. Under sub. 1 of the same sec. 4097, Stats., here involved, authority is given to strike out the pleading of a party individual, either within or without the state, for a refusal to appear and testify. That such power might be properly exercised in the court's discretion does not seem to have been questioned or doubted in what was

said by this court in *Eastern R. Co. v. Tuteur,* 127 Wis. 382, 410, 105 N. W. 1067. Sec. 3072, Stats., provides for a dismissal of an action where proper proceedings are not taken within the time limited after the determination of an appeal to this court. *State ex rel. Mitchell v. Johnson,* 105 Wis. 90, 80 N. W. 1104. Sec. 2811*a* provides for the dismissal of pending actions in which there has been delay in bringing the cause to trial. *Pereles v. Christensen,* 164 Wis. 163, 159 N. W. 817. Sec. 4064 authorizes the striking out of the pleading of a party who fails to attend as a witness when duly subpœnaed; and sec. 2664 permits such striking out for failure to file the same within a specified time, the validity of which was apparently unquestioned in *Evans v. Rector,* 107 Wis. 286, 289, 83 N. W. 292.

The provision here enforced is certainly no more drastic than in the above instances or than when the same result is arrived at, so repeatedly upheld by this court, in denying to a nonresident corporation which has failed to comply with the provisions of sec. 1770*b* the right to even cross the threshold of our courts in attempting to enforce, as against a resident here, a contract made within this state.

Similar remedies have been enforced in other jurisdictions. *Gross v. Clark,* 87 N. Y. 272, 273; *Larimore v. Bobb,* 114 Mo. 446, 21 S. W. 922; *French v. Central C. Co.* 76 Ohio St. 509, 81 N. E. 751; *Conrad Schopp F. Co. v. Bondurant,* 134 Ky. 568, 121 S. W. 482.

The remedy here invoked must therefore be considered as a well recognized and established method of legal procedure in the courts of this state, binding on all litigants subject to the jurisdiction of such courts and whether residing within or without the state, unless and except as to some litigants it is within the prohibition of the Fourteenth amendment to the United States constitution, *supra.*

So far as this case involves a claim by appellant of a violation under the federal constitution, it is controlled against its contention by the decision of *Hammond P. Co.*

v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, affirming 81 Ark. 519, 100 S. W. 407. In that case a state statute requiring foreign corporations to produce books and papers for examination within the state in an action brought against such corporation was held not a violation of the due process of law guaranteed under the Fourteenth amendment. In that case the order of the state court striking out an answer interposed by a defendant who had refused to so produce within the jurisdiction of that court matters of evidence deemed material, was justified and upheld on the ground that it was in effect based upon the inherent right of a law-making authority to create a presumption of lack of merit in an asserted defense against a defendant who fails to produce evidence when legally called upon to so do. Page 353. The same case discusses the case relied upon by appellant here, of *Hovey v. Elliott,* 167 U. S. 409, 17 Sup. Ct. 841, and thereby renders it unnecessary to make further reference to or discussion of the latter case. *Hovey v. Elliott* is also discussed in the case of *Roller v. Murray,* 234 U. S. 738, 746, 34 Sup. Ct. 902, in a manner clearly indicating that it is not applicable to the situation presented here, the plaintiff having had a full opportunity to be heard on the precise question involved, the right denied him in the *Hovey Case.*

Under sub. 6 of the same sec. 4096, Stats., here involved, the examination of a resident of the state shall not be compelled in any other county than that in which such party resides, and further provides that in case the plaintiff or defendant is a nonresident his deposition may be had in any county in this state in which he can be personally served with notice and subpœna. This provision in no wise avails the plaintiff as such nonresident corporation or its nonresident secretary, Boswell. As to the latter, he cannot well complain that his examination is being fixed at a place within some other county than that of his residence within the state, he having none such. Neither can he properly complain

on the ground that he has not been served with subpœna within some county of the state, because, plainly, such provision is cumulative merely and not intended to be the exclusive remedy for any such examination of a nonresident.

We hold, therefore, that where, as here, a nonresident corporation comes voluntarily into this state to seek the remedies afforded by the courts of this state as plaintiff against a defendant resident here, such plaintiff must submit to reasonable orders, within the proper exercise of judicial discretion, requiring it to produce documentary evidence or to require its officers to submit to oral examination within the jurisdiction of such court. And in the absence of a showing, as is the case here, that such orders are made without notice to such plaintiff and an opportunity on its part to be heard, are arbitrary or oppressive, or require the plaintiff to do that which is beyond its power or ability to do, such orders will be enforced and upheld.

By the Court.—Orders affirmed.

FEDERAL ASBESTOS COMPANY, Respondent, vs. ZIMMERMANN, Appellant.

May 4—June 1, 1920.

Evidence: Proof of mailing letter: Customary routine of office: Appeal: Prejudicial error.

1. Proof that a letter addressed to defendant was dictated by plaintiff, coupled with proof of the custom in plaintiff's office with reference to mailing letters, is not sufficient to show mailing of a letter which defendant denied receiving, without some evidence to warrant an inference that the office customs were complied with in respect to the particular letter.
2. Where the testimony of the parties differed as to the substance of a conversation between them modifying a previous contract, error in admitting a copy of a letter purporting to have been written in confirmation of that conversation was prejudicial.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

The defendant in this case is a building contractor. The plaintiff, among other things, deals in hot and cold water pipe covering. The defendant had a contract for the construction of two school buildings and the Plankinton Hotel building in the city of Milwaukee. In the months of May and June, 1916, it was contracted between plaintiff and defendant that the former should furnish and apply certain hot and cold water pipe covering for said buildings. It appears that the pipe covering furnished by plaintiff was not acceptable to the owners of said buildings and that the contracts first entered into were modified. It is claimed by the plaintiff that by the terms of the modification it was to do the work of applying the pipe covering (and perhaps furnish some of the material) upon a *quantum meruit* basis, while defendant claims that the original contracts were modified by other express contracts. The question litigated was whether the work and services rendered and the material furnished by the plaintiff were to be compensated as per express contract or upon *quantum meruit.*

The case was tried in the civil court of Milwaukee county. The jury found that the work, services, and material were to be compensated upon a *quantum meruit* basis and assessed plaintiff's damages at $1,200. The civil court substituted $1,557.97 in place of $1,200 and rendered judgment in favor of plaintiff for the latter amount. From the judgment so rendered defendant appealed to the circuit court, where $1,200, the amount found by the jury, was substituted for $1,557.97, the amount found by the civil court. With such modification the circuit court affirmed the judgment of the civil court. From the judgment of the circuit court modifying and affirming the judgment of the civil court the defendant brings this appeal.

For the appellant there were briefs by *Howard P. Haberla,* attorney, and *Carl H. Juergens,* of counsel, both of Milwaukee, and oral argument by *Mr. Juergens.*

For the respondent there was a brief by *Nohl & Nohl* of Milwaukee, and oral argument by *Leo F. Nohl.*

OWEN, J. There was a mistrial of this case in the civil court for the following reason: The question litigated was whether the modification of the original contract called for continuance of work on the part of the plaintiff in applying certain pipe covering upon a *quantum meruit* basis or upon terms as fixed by an express contract. Mr. Dieringer, an officer of the plaintiff company, testified that he had a conversation with reference to the three jobs with the defendant at the Plankinton Hotel the 3d of August, which was about the time that the plaintiff was stopped from furnishing further material for the Plankinton Hotel job under the original contract. After having so testified, the carbon copy of a letter which Mr. Dieringer claimed to have sent to the defendant, dated on that day, upon the face of which it appeared to have been written either in confirmation or in pursuance of a conversation had between Mr. Dieringer and the plaintiff at the Plankinton Hotel on the morning of that day, was introduced in evidence. Before its introduction, the defendant was called upon to produce the original of the letter. He claimed he did not have the original thereof and had never received such a letter. The introduction of the carbon copy in evidence was objected to on the ground that it did not appear that the original had ever been mailed. The sum and substance of the testimony which the trial court held constituted proof of mailing was this: Mr. Dieringer testified that he dictated the letter. He did not testify that he had signed it or that he had seen it after it had been transcribed by the stenographer. He testified that it was taken care of and sent out in the usual course of business, and that it was sent to *Mr. Zimmermann* in the usual course of business. He was asked: "How do you know it was? *A.* It was mailed. *Q.* Did you mail it yourself? *A.* Why, no, I don't do any of our mailing; our mail is put in the pouch and then the collector calls for it. *Q.* How do you

know that this letter was put in the pouch, Mr. Dieringer? *A.* I don't know that." He testified that the method of handling correspondence in the office was as follows:

"I dictate my mail and then I sign it and then one of the stenographers takes it and mails it, which depends upon the time of the day; the evening mail is taken to the box, and the morning mail and noon mail is taken away by automobile delivery which takes care of the West Side manufacturers. After this letter was dictated by me it went through the usual course. For the last year or two the government has put in an automobile delivery up on the West Side, along on Thirtieth street and Twenty-ninth street, for all these manufacturing plants up there, and the morning mail and noon mail is taken by the automobile delivery, and of course the evening mail is taken out to the box. I take it, or one of the girls takes it, or Mr. Schoell takes it to the box. It just depends upon who is left in the office, he takes the mail. Our mail is stamped and the postage is prepaid. The address of the party is on the envelope, and the return address is on it in case it doesn't get there. Either myself or Mr. Schoell or the stenographer handles the letters after they are signed by the dictator, depends upon, and they are instructed when the letter is transcribed by them and signed by the dictator or the writer to put it in the mail pouch. Sometimes Mr. Schoell tends to that or the stenographer, it just depends upon; in the usual course the mail is put in the pouch. The afternoon mail is put in the pouch, and whoever goes out takes it along and drops it in the letter-box."

Upon this testimony the court held that the mailing of the letter had been sufficiently proved and admitted the copy in evidence. This we think was error. We know of no decided case which holds that mere dictation or writing of a letter, coupled with evidence of an office custom with reference to the mailing of letters, is sufficient to constitute proof of the mailing of such letter, in the absence of some proof or corroborating circumstance that the letter was at least placed where, in the ordinary course of business, it would be taken to the postoffice.

Thus in *Elmore v. Busseno,* 175 App. Div. 233, 161 N. Y.

Supp. 533, it was held that the mere fact that a letter confirming a sale was written and an envelope prepared, and such letter given to the seller's manager and signed by him and handed to an office boy, required to put each letter in its proper envelope and seal, stamp, and mail it, is not sufficient evidence of the mailing of the letter, where its receipt by the buyer was denied.

In *Flack v. Green,* 3 Gill & J. (Md.) 474, 480, plaintiff offered to prove by sundry witnesses that it was the invariable and uniform practice of that house to forward certain notices immediately upon receipt of them, and that they had no doubt from the course of their business that they had forwarded a certain notice to the defendant, but that they had no recollection upon the subject of forwarding the particular notice to the defendant; that from the general course of their business, and from the particular custom of their counting-house, in respect to such notices, they believed the notice in question had been duly transmitted to the defendant. Held insufficient to prove the fact of mailing.

In *Brailsford v. Williams,* 15 Md. 150, the court said:

"We think, however, that the evidence offered for the purpose of showing that the letter had been mailed, was not legally sufficient. The fact was to be found by the jury from the custom prevailing in the counting-room of the writer; but compliance with the custom had not been fully proved. The person whose duty it was to deposit letters in the postoffice should have been called, or his absence accounted for."

In *Dowagiac M. Co. v. Watson,* 90 Minn. 100, 95 N. W. 884, it was said, in effect, that from the proof of a custom with reference to the acceptance of contracts when received it does not follow that in the particular instance a letter of acceptance was in fact written and mailed.

In *Hastings v. Brooklyn L. Ins. Co.* 138 N. Y. 473, 34 N. E. 289, defendant produced and put in evidence a letter-press copy of a letter from its secretary to the insured. The

secretary testified that he wrote and signed the letter and gave it to an attendant to copy in the letter-press book; that it was brought back to him in a condition showing that it had been in the letter-press; that he inclosed it in a sealed envelope and put it in a basket in the office, where letters for mailing were usually placed. Defendant's porter testified that it was his business to take the letters from the basket and mail them; that he mailed all letters found in the basket, but had no recollection of seeing or handling this letter. Held, that the evidence was not sufficient to establish as matter of law that the letter was mailed, and a refusal to submit the question to the jury was error.

An examination of the reported cases where proof of custom has been held sufficient to establish the fact of mailing will show that there was testimony from which it might be inferred that the custom in the particular instance had in fact been followed.

In *Bell v. Hagerstown Bank,* 7 Gill (Md.) 216, the bank proved by the cashier that he had a distinct recollection of receiving certain notices, and that on the same day he sealed and directed them to the drawers and indorsers at their respective postoffices; that the bank had a regularly appointed messenger whose duty and practice it was to go to the bank daily about the closing hour, when the cashier delivered to him all letters and notices for the postoffice, and sometimes, when he left the bank before the messenger arrived, he placed such letters carefully upon the table, and there was a general understanding that the messenger was to take them to the postoffice. It was further proved by the teller of the bank that, when the cashier left the bank before the messenger arrived, the teller saw to it that the letters were taken by the messenger, or the messenger took the letters himself, from the table; that he had been exceedingly particular in this respect, and had no recollection of an instance when they had not been taken from the bank on the same day. The messenger further testified to the custom and to the

fact that he had never failed in his duty except on one occasion. This evidence was held sufficient to establish a compliance with the custom of the bank and to constitute proof of mailing.

A letter-press copy dated January 27, 1892, was offered in evidence in *McKay v. Myers,* 168 Mass. 312, 47 N. E. 98. Besides proof of the custom of the office from which the letter was sent, a letter from the defendant, under date of October 10th, contained indications that the letter referred to in it was that of January 27th. On this evidence the copy was held admissible.

The rule stated in 16 Cyc. 1068, note 50, is that "proof of custom in the sender's office whereby letters deposited in a particular place are taken by an employee and mailed by him, in connection with proof that the letter was so deposited and probably taken and mailed as usual, may support a presumption of due receipt." We think this states the rule as strongly as the authorities warrant. Manifestly the proof in this case did not meet this requirement. While we do not attempt to lay down any hard-and-fast rule with reference to the proof necessary to constitute mailing where custom or usage of an office is relied upon as a contributing element to such proof, we do hold that proof of the dictation of a letter, coupled only with proof of the custom of the office with reference to the mailing of letters, without any proof from which it may be inferred that in the particular instance the custom was complied with, does not constitute proof of mailing. It is conceded that the carbon copy of the letter introduced in evidence had a material bearing upon the vital issue in the case; and as upon that issue the word of one party was pitted against that of the other, we cannot say that the admission of this evidence did not have a controlling influence with the jury, and for the error in its introduction a new trial must be had.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

LIQUIDATION OF CITIZENS SAVINGS & TRUST COMPANY: FLOERSHEIMER and another, Appellants, vs. COUSINS, Commissioner of Banking, Respondent.

May 4—June 1, 1920.

Banks and banking: Liquidation by commissioner of banking: Possession of leasehold property: Covenant in lease against assignment: Effect: Liability of commissioner for rent: Assignment of lease.

1. When the state commissioner of banking took possession of the property and business of a trust company for liquidation under sec. 2022, Stats., he became vested with title to and right of possession of the property and assets, including a lease of the premises, as liquidating agent for the benefit primarily of the company's creditors.
2. The transfer of title from a trust company to the commissioner of banking by devolution in liquidation proceedings under sec. 2022, and any transfer that the commissioner might make of the lease of the bank premises in course of liquidation, did not constitute a breach of the covenant in the lease against assignment.
3. By taking possession of such property and assets the commissioner did not thereby accept a burdensome lease of the premises occupied by the bank, but merely became liable for the rent accruing while he held the premises—a liability which he could terminate by assigning the lease and relinquishing possession.

APPEAL from a judgment of the circuit court for Milwaukee county: A. H. REID, Judge. *Affirmed.*

This action was brought by the appellants, owners of the Pereles building in Milwaukee, to charge the commissioner of banking, who had charge of the liquidation of the Citizens Savings & Trust Company, with payment of rent for the full term of the lease held by the trust company when it went into liquidation, and to have the rent for such full term declared an expense of administration and an obligation of the commissioner, and to have the court direct the

commissioner to retain out of the assets of the Citizens Savings & Trust Company in his hands a sum sufficient to pay this rent.

The petition, which was filed in September, 1918, is based upon the alleged acceptance as an asset by the commissioner of banking of this lease made between Nathan Pereles & Sons and James M. Pereles as lessors and the Citizens Trust Company as lessee, for a term of twenty years from January 1, 1907.

The commissioner of banking assumed title and possession of the assets of the trust company on October 2, 1913, and occupied the leased premises until December 31, 1918. The trust company had installed in these premises bank vaults and about 1,500 safety-deposit boxes, which boxes it had leased to a large number of patrons by continuing leases. The commissioner of banking collected all rentals of such deposit boxes accruing after October 2, 1913. During the last half of the year 1918 the commissioner sold the vaults and deposit boxes in parcels. On December 31, 1918, the commissioner removed all remaining assets, books, and papers of the trust company from the premises and vacated the same.

After the commissioner of banking had taken possession of the premises on October 2, 1913, he for a long time refused to pay any rent, but on March 24, 1915, he was ordered in an action against him to pay all rent that had accrued during his occupancy of the leased premises. Upon appeal to this court this order was affirmed, and the commissioner paid the rent during his occupancy of the premises according to the terms of the lease.

In the present proceeding the commissioner denies that he ever took possession of the leasehold as an asset of the trust company, and prays, by way of a cross-petition, for an order that he be directed to surrender the leasehold, provided the petitioners would accept such surrender and release the commissioner from liability for rent after Decem-

ber 31, 1918, and, if not, then that the commissioner be directed to quitclaim and assign the lease, and, if necessary, pay a reasonable sum of money to secure an assignee to accept it.

The title to the property in question has been transferred several times, the present owners being the *City Hall Square Company* and *Fannie M. Floersheimer.*

The case was tried by the court. The court found that the commissioner now has, and at all times after taking possession of the premises had, the right to assign and transfer the lease to other parties, and by such assignment to free himself from further liability for rent of these premises. The court further held that the commissioner is not liable for the prayer of the petitioners so far as it seeks to charge him with rent for the full term of the lease, nor can he be required to retain out of the assets of the trust company in his hands a sum sufficient to pay the rent. The court further held that the banking commissioner did not divest himself of the title to the lease by the mere abandonment of the premises and has not relieved himself of responsibility for the rent for the quarters beginning January 1, 1919, and April 1, 1919, amounting to $750 each, and that petitioners are entitled to an order directing payment to the owners of the premises of the amount of such rent.

Judgment was entered in accordance with these findings, and from this judgment appeal is made.

For the appellants there was a brief by *Charles L. Aarons* and *Miller, Mack & Fairchild,* all of Milwaukee, and oral argument by *Mr. Aarons.*

For the respondent there was a brief by *Flanders, Fawsett & Smart,* and oral argument by *Charles E. Monroe,* all of Milwaukee.

SIEBECKER, J. The lease in question contains a covenant by the lessee "not to assign or underlet said premises or any part thereof or otherwise part with this indenture . . . with-

out the consent thereto in writing of the said lessor . . . or assigns." When the commissioner of banking took possession of the property and the business of the trust company under sec. 2022, Stats., including the premises embraced in this lease, he became vested with the title and right of possession of such property and assets as liquidating agent for the benefit primarily of the trust company's creditors. *Citizens S. & T. Co. v. Rogers,* 162 Wis. 216, 155 N. W. 155.

The title and interest held by the banking commissioner to the trust company's property and assets is vested in him by the statutes and he held it in trust for the trust company and its creditors. Such interest in the property held by the commissioner is akin to the title and interest vested in assignees or receivers who take and hold property of a debtor in legal proceedings for the benefit of creditors.

It appears that the commissioner took possession of the leased premises and remained in possession during the liquidation proceedings. As such possessor he was held liable for the rent reserved in the lease during his occupancy. *Rogers Case, supra.* The trial court correctly held that the transfer of title from the trust company to the commissioner by devolution in the liquidation proceedings and any transfer that the commissioner may make of the lease in the course of liquidation does not constitute a breach of the covenant in the lease against assignment. "A restriction against transfer is not, as a general rule, regarded as broken by an involuntary alienation or transfer by operation of law." 24 Cyc. 970; 16 Ruling Case Law, p. 834, § 333; *Gazlay v. Williams,* 210 U. S. 41, 28 Sup. Ct. 687.

The *Rogers Case* in effect held that the commissioner's election to take possession of the premises vested him with title to "the leasehold interest" and created a privity of estate between the lessor and the commissioner and made the commissioner liable for the rent while in possession. *U. S. T. Co. v. Wabash W. R. Co.* 150 U. S. 287, 14 Sup. Ct. 86; 16 Ruling Case Law, p. 859, § 361.

The commissioner's possession, under the circumstances, cannot be held to be an acceptance by him of this burdensome lease, but operated to make him liable for the rent accruing while he held the premises, and he could terminate the liability by assigning the term and relinquishing possession. 16 Ruling Case Law, p. 864, § 367; *Patten v. Deshon*, 1 Gray, 325.

The trial court properly held that the commissioner had the legal right to assign the lease and thereby free himself from further liability for rent. The judgment properly awarded petitioner recovery of the $750, the amount due under the lease for the June and April quarters as specified in the judgment, and properly authorized the commissioner to make an assignment of the lease upon the best terms procurable, and that upon delivery of the premises to such an assignee his liability for the rent reserved in the lease ceased.

By the Court.—The judgment is affirmed.

KATZER, Appellant, vs. SCHUENKE, Respondent.

May 4—June 1, 1920.

Specific performance: Contracts: Expression of an intended method to secure purchase price of property: Enforceability: Certainty of contract.

1. The expression of an intention by the purchaser of real estate and personal property to raise money to meet a future payment by executing and selling a mortgage on his homestead, is not a contract that can be specifically performed.
2. Even if such expression of intention be regarded as a contract, specific performance thereof could not be granted, neither the amount of the mortgage, its term, how payable, nor the mortgagee being shown.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to compel specific performance of an alleged oral agreement to execute and deliver a mortgage on certain real estate to plaintiff as security for a payment of the unpaid purchase price of $875 due him from defendant on a sale of his saloon to defendant's husband, since deceased. The substance of the complaint is that Herman Schuenke, since deceased, on July 22, 1915, bought plaintiff's saloon for $900, paying $25 in cash, and together with his wife agreed to execute and deliver a mortgage on certain described property, being the homestead of the defendant, bearing legal rate of interest, to secure or pay the balance of the purchase price due August 2, 1915. It further alleges that the defendant promised for the benefit of her separate estate to join in the execution of the mortgage.

The trial judge found that the contract for sale was entirely embodied in the written agreement entered into between the parties dated July 22, 1915, as follows:

"This agreement, made this 22d day of July, 1915, by and between *Albert Katzer,* of the city and county of Milwaukee and state of Wisconsin, party of the first part, and Herman Schuenke, of the same place, party of the second part,

"Witnesseth: that the said party of the first part covenants and agrees, for the consideration hereinafter mentioned, by and with the said party of the second part, to transfer, set over, and deliver to the said party of the second part on the 23d day of July, 1915, the following described personal property now contained in the two-story brick building, occupied as saloon, pool hall, and dwelling, and situated at No. 659 Third street, in the city and county of Milwaukee and state of Wisconsin, to wit: [Here follows a description of the contents of the saloon.]

"The said party of the first part agrees to deliver the above enumerated personal property to the said party of the second part free and clear of all lien and incumbrances and to hold the said party of the second part harmless of any person or persons making claim or demand for any article above mentioned. In consideration of which the said party of the second part agrees to pay the said party of the first

part the sum of $25 at the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the further sum of $875 on or before the 2d day of August, 1915."

It further found that no agreement to execute a mortgage was made either by the defendant or her husband, and held that defendant, both in her personal and representative capacity, was entitled to a dismissal of the action with costs. From a judgment entered accordingly the plaintiff appealed.

For the appellant the cause was submitted on the brief of *Benjamin T. Schick,* attorney, and *Nohl & Nohl,* of counsel, all of Milwaukee.

For the respondent there was a brief by *Houghton, Neelen & Houghton* of Milwaukee, and oral argument by *Albert B. Houghton.*

VINJE, J. The complaint alleges that a mortgage was to be given to secure or pay for the balance of the purchase price. The proof is undisputed that no promise to execute and deliver a mortgage to secure the balance of the purchase price was ever made. When Herman Schuenke bought the saloon he expressed an intention to execute a mortgage upon his homestead for either $1,000 or $1,500 to raise money to pay for the saloon and to supply funds for carrying it on. As a matter of fact he did execute a mortgage, joined in by the defendant, for $1,500, but the name of the mortgagee was left blank, and it was the intention to sell the mortgage and thus secure the money to meet the final payment on the saloon. But the mortgage was never sold. The plaintiff himself testifies that the talk was that the mortgage was to be sold and he was to be paid out of the proceeds. This is the undisputed testimony of defendant, the scrivener, Grootemaat, and of his son. The evidence therefore presents a case where a purchaser expresses the intention to raise money to meet a future payment by selling a mortgage on his property. The expres-

sion of such intention does not constitute a contract that can be specifically performed. It is not a contract at all, but a mere statement as to how he expects to get the money to make the payment. A default in thus securing the money cannot constitute a cause of action for specific performance. Even if regarded as a contract the court could not in this case grant specific performance, because the proof is barren as to who should be the mortgagee; for what sum the mortgage should be made; for how long it should run; and how it was to be paid, whether in one or several instalments. For these reasons the court properly dismissed the action.

By the Court.—Judgment affirmed.

WILL OF PAYNE.

May 4—June 1, 1920.

Wills: Interest on legacies: When payable: Executors and administrators: Payment of legacies.

1. Interest is due on legacies, not as a penalty for nonpayment on demand or a default in payment, but as a part of or incident to the legacy itself.
2. Where a will provided that if at the time of the death of testatrix a portion of the estate should be invested in such a way that it would be inexpedient to immediately settle the estate, the executors need not divide the same or pay any legacies for a period of three years, interest is not payable on the legacies until the expiration of the three-year period, it appearing that the testatrix made provision for maintenance during that period of those dependent on her bounty.
3. Where testatrix, recognizing that it might be inexpedient to immediately settle her estate, authorized the executors to pay certain legacies after three years, and, if necessary, to delay payment of other legacies for a period not to exceed five years, and provided that when the estate, or portions thereof, were sold the moneys derived from such sales should be applied from time to time to settle certain of the legacies, with interest at five per cent. per annum, interest on such legacies was not payable annually, but, in accordance with the rule applicable to contracts, at the time the legacies were payable.

APPEAL from a judgment of the county court of Milwaukee county: MICHAEL S. SHERIDAN, Judge. *Modified and affirmed.*

Construction of will. Lydia W. Payne died on December 24, 1915, and by will disposed of an estate consisting of stocks and bonds appraised at $392,758.89. By her will she directed the payment of certain legacies, either directly to the legatees or in trust for their benefit. Clause 19 is as follows:

"*Nineteenth.* At the time of my decease, a portion of my estate may be invested in such a way that it would be inexpedient to settle my estate within the period it ordinarily takes to settle an estate. Therefore, it is my wish that the executor hereby appointed need not divide my estate or pay any legacies until, in their judgment, such division would be for the best interest of my estate as a whole, but in no event shall my estate remain undivided under this provision for a longer period than three (3) years from the date of my decease. If at the date of such division any portion of my estate should still be invested in such a way that it would be inexpedient to sell the same, and the remaining portion of my estate, after paying all the legacies therein contained except those provided for in paragraphs marked 'Second,' 'Third,' 'Fourth,' 'Fifth,' 'Sixth,' and 'Seventh,' should not be sufficient to meet the requirements of said paragraphs marked Second, Third, Fourth, Fifth, Sixth, and Seventh, then it is my wish that my trustee continue to hold said portion of my estate as it regarded inexpedient to sell until the same be sold, but in no event longer than five (5) years after the settlement of my estate, and when so sold be applied from time to time to satisfy the unsatisfied portion of the paragraphs marked Second, Third, Fourth, Fifth, Sixth, and Seventh, together with interest at five (5) per cent. per annum. During the period when my estate remains undivided my executor is still authorized to pay any of the legacies herein provided for when any such legacy shall not exceed in value two thousand dollars ($2,000), if, in its judgment, any such payment can be made without injury to the *corpus* of my estate; and my executor can exercise its own discretion as to the priority between said legacies so

paid. My trustee or its successor or successors in trust is authorized to advance to Kathryne Van Dyke at any time her legacy of ten thousand dollars ($10,000), or any part thereof, as I desire her to be in a position to continue her education. If my estate should prove insufficient to meet all the legacies herein contained, then it is my wish that the small legacies be paid and any deficit be shared *pro rata* by the legacies provided for in paragraphs Second, Third, Fourth, Fifth, Sixth, and Seventh.

"During the settlement of my estate and from and after my decease, I direct my executor to make the following monthly payments to the following persons:

"To my sister, Louise, wife of Charles P. Jones, two hundred dollars ($200) per month; to my niece, Margaret V. Jones, sixty dollars ($60) per month; to my nephew, *Arthur J. Van Dyke,* son of my deceased brother, Rodolphus Van Dyke, fifty dollars ($50) per month; to my brother, Arthur Van Dyke, one hundred dollars ($100) per month; to my niece, Kathryne Van Dyke, daughter of my brother Arthur Van Dyke, one hundred dollars ($100) per month. I direct that after the death of my sister, Mrs. Charles P. Jones, the two hundred dollars ($200) per month which I directed above to be paid her during the settlement of my estate shall be paid to my nieces, Margaret V. Jones and Kathryne Van Dyke, share and share alike, and to the survivor or survivors of them."

The estate proved to be insufficient to carry out all of the provisions of the will, and the question arose whether certain legacies should bear interest from one year after the date of the death of testatrix or from the end of the three-year period. The county court by its final decree directed that the executor, by paragraph 1, should pay interest upon the legacies provided for by paragraphs Eighth, Ninth, Tenth, Eleventh, and Thirteenth at the rate of six per cent. per annum from December 24, 1916, or one year after the death of the testatrix, to the time of payment of the legacies respectively; and further that the executor should pay interest at the rate of six per cent. per annum upon the legacies provided for by paragraphs Second, Third, Fourth, Fifth,

Sixth, and Seventh at the rate of six per cent. per annum for the period commencing December 24, 1916, and ending December 23, 1918, and thereafter in accordance with the decree.

From this part of the final judgment of the county court the executor and *Cornelia Van Dyke Jones,* one of the residuary legatees, appeal.

For the appellant *First Wisconsin Trust Company* there was a brief by *Miller, Mack & Fairchild* of Milwaukee, and oral argument by *George P. Miller.*

William J. Zimmers of Milwaukee, guardian *ad litem,* for the appellant *Cornelia Van Dyke Jones.*

For the respondent *Francis H. Whitney* there was a brief by *Lines, Spooner & Quarles,* and oral argument by *Charles B. Quarles* and *Howard A. Hartman,* all of Milwaukee.

William W. Wight of Milwaukee, for the respondent *Arthur J. Van Dyke.*

ROSENBERRY, J. It is agreed by all of the parties in interest that the intent of the testatrix is controlling. The controversy arises because different inferences are drawn as to her intent. The Nineteenth clause contains the following provision:

"At the time of my decease, a portion of my estate may be invested in such a way that it would be inexpedient to settle my estate within the period it ordinarily takes to settle an estate. Therefore, it is my wish that the executor hereby appointed need not divide my estate or pay any legacies until, in their judgment, such division would be for the best interest of my estate as a whole, but in no event shall my estate remain undivided under this provision for a longer period than three (3) years from the date of my decease."

If the will contained no other provision, the argument made by respondents that the will shows no intent to depart from the settled rule would be entitled to great weight, particularly in view of the fact that this court has adopted

the doctrine that interest is due on a legacy not as a penalty for nonpayment on demand or a default in payment, but as a part of or incident to the legacy itself. *Will of Brandon,* 164 Wis. 387, 160 N. W. 177.

In support of their contention respondents cite the following cases: *Loring v. Massachusetts H. Soc.* 171 Mass. 401, 50 N. E. 936; *Warwick v. Ely,* 59 N. J. Eq. 44, 44 Atl. 666; *In re Spencer,* 16 R. I. 25, 12 Atl. 124; *Kent v. Dunham,* 106 Mass. 586; *Ogden v. Pattee,* 149 Mass. 82, 21 N. E. 227; *O'Leary's Estate,* 255 Pa. St. 521, 100 Atl. 459.

As was said in *Will of Elmore,* 165 Wis. 266, 162 N. W. 438, authorities and rules are helpful, but each will must be interpreted in the light of the circumstances surrounding the testator. When the intent of the testator appears, it is the duty of the court to carry out that intent. *Will of Stark,* 149 Wis. 631, 134 N. W. 389. The provisions of subdivision Nineteen show that the testatrix had the matter of interest in mind, for she provided for the payment of interest at the rate of five per cent. per annum, one per cent. less than the legal rate, upon such portions of the provisions covered by the Second, Third, Fourth, Fifth, Sixth, and Seventh paragraphs as should remain unpaid at the expiration of the three-year period. Had she intended that all the legacies should bear interest at the rate of six per cent. during the settlement period, there would have been no reason for the provision in regard to interest after the expiration of the three-year period. No reason is assigned or suggested why interest should be paid at the rate of six per cent. during the period of settlement, and at a lesser rate when by the terms of the will the legacies were due and payable. In addition she provided, by the clause marked "Nineteenth," for the maintenance during the period of settlement of those who were dependent upon her bounty. We are of the opinion that the provisions of the will indicate that the testatrix intended that the legacies should not begin

to bear interest until the end of the three-year period, unless settlement should be sooner made in the discretion of her executor. Interest, therefore, did not commence to run upon the legacies described in paragraph 1 of the decree until the end of the three-year period, or December 24, 1918.

It is further contended on behalf of some of the respondents that under the provisions of the clause marked "Nineteenth," interest at the rate of five per cent. was payable annually. The provision is that when the property is sold the proceeds shall "be applied from time to time to satisfy the unsatisfied portion of paragraphs marked Second, Third, Fourth, Fifth, Sixth, and Seventh, together with interest at five per cent. per annum." Where a contract provides for the payment of a certain rate of interest per annum, it only fixes the rate to be paid and has no reference to the time when such interest shall be paid, and interest so reserved is held to become due and payable only with the principal. 22 Cyc. 1483, and cases there cited. We see no reason why the same rule should not be applied to payments of legacies under a will. If this were not the general rule of law, the fact that by the terms of the will the payments required by the Second, Third, Fourth, Fifth, Sixth, and Seventh paragraphs are payable only when funds are derived from the sales of certain property, indicates that it was the intention of the testatrix that the legacy, including interest, should be paid at one time.

By the Court.—Judgment of the county court is modified as indicated in this opinion, and as so modified is affirmed, appellant to recover costs in this court.

KLEMENS, Appellant, vs. MORROW MILLING COMPANY, Respondent.

May 5—June 1, 1920.

Negligence: Sightseer in mill: Frequenters, licensees, and trespassers: Duty to furnish safe place to work.

An employee of a mason contractor doing work on an outside wall of the boiler room of a mill, who during the noon hour, for pleasure, wandered through the mill and was injured in using a so-called manlift or Humphrey elevator having no safety device, was a trespasser, and not a licensee, within sub. (5), sec. 2394—41, for whom as well as for employees sec. 2394—48 requires an employer to make the place of employment reasonably safe.

APPEAL from a judgment of the circuit court for Milwaukee county: BYRON B. PARK, Judge. *Affirmed.*

The defendant *Morrow Milling Company* had purchased, shortly before November, 1917, from the former owner and operator, the cereal milling plant and the premises here in question.

Plaintiff was employed by one Andrew Tophooven, a mason contractor, to work as helper in the doing of some mason repair work for the defendant company on the outside brick wall of its boiler room, which was on the southeast corner of the premises. Defendant was to pay Tophooven for this work at an agreed price per hour. Tophooven had done work about the premises at various times for several years prior to defendant's purchase of the premises. During the noon hour of November 5th, after the two had been eating their lunch inside the yard of defendant's premises, Tophooven suggested that they go through the main building for the purpose of seeing how the oatmeal was made which the defendant was then furnishing to the United States government under a war contract, and that they would also at the same time be able to get a view of the city from the top of the six-story building.

Inside this main building which the two entered from the yard and some 145 feet from where they had been working and about a similar distance from their lunching place, there was in operation a so-called manlift or Humphrey elevator. This consisted of a fourteen-inch belt running over one pulley situated on the ground floor and an upper one nine and one-half feet above the top or sixth floor; through each of the intermediate floors was an opening wide enough to permit the passage of the belt, together with the small platforms or steps attached to said belt, and at distances of about every fifteen feet. There was a rope on each side of the elevator which enabled a person riding on the elevator to stop the same. This manlift was run by the mill machinery at such rate of speed as to permit the stepping off or on of persons desiring to go up on the one side thereof or down on the other. At the time of the accident there were no safety devices on it which would automatically prevent the occurrence of that which happened in this instance.

Tophooven had been through the building a number of times before and had also used this manlift. Nothing was said by either Tophooven or the plaintiff to any person connected in any way with defendant's employment with reference to the proposed use of such manlift by either of them.

On arriving at the foot of this manlift Tophooven stepped upon one platform or step thereof and plaintiff stepped on the succeeding one as it passed upwards. As Tophooven reached the level of the third floor he stepped off onto such floor, apparently because the conveyor seemed to be overloaded, and plaintiff then passed on beyond the third floor and was told by Tophooven to proceed to the top floor and he, Tophooven, would follow as he did by stepping upon the next step below the one still occupied by the plaintiff. Plaintiff continued upward, and as he arrived through the upper floor he perceived that the conveyor on which he was then standing would, unless stopped, carry him on and

over the roller, from which position he was likely to be precipitated to the floor.

He testifies that he did not know how to stop the conveyor by the use of the rope attached to the side thereof and called out to Tophooven to stop the same. Nothing was done, however, by either in that regard, and as the conveyor passed over the top of the roller plaintiff was dropped from the height of about nine and one-half feet to the level of the sixth floor, sustaining serious injuries.

Plaintiff commenced this action charging Andrew Tophooven, as well as the *Morrow Milling Company,* with a breach of duty to him resulting in his injury.

Upon the trial the action was dismissed as to Tophooven and no question raised as to such ruling on this appeal. Defendant moved for a directed verdict at the close of the testimony, ruling on which motion was withheld until after the return of the special verdict. The special verdict as answered was in substance as follows:

(1) The plaintiff was injured by being carried over the pulley. (Answered by the court.)

(2) The *Morrow Milling Company* failed to furnish and use such safety device in connection with this manlift as was reasonably necessary to render its place of employment safe for frequenters thereof.

(3) Such failure was a proximate cause of plaintiff's injury.

(4) The *Morrow Milling Company* was negligent in not posting notice warning frequenters against using this manlift.

(5) Such negligence was the proximate cause of plaintiff's injury.

(6) There was no want of ordinary care on plaintiff's part proximately contributing to his injury.

(7) The plaintiff's damages were $10,000.

The trial court charged the jury on this special verdict that they were to assume that the plaintiff was a frequenter

of defendant's place of employment under sec. 2394—48, Stats., which reads, so far as material, as follows:

"Every employer . . . shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. . . ."

The term "frequenter" as there used is defined in sub. (5), sec. 2394—41, as follows:

"The term 'frequenter' shall mean and include every person, other than an employee, who may go in or be in a place of employment or public building under circumstances which render him other than a trespasser."

After verdict the court disposed of the motion made by defendant for a directed verdict by holding, in substance, that the plaintiff was a trespasser rather than such frequenter as specified in the foregoing statutes, and that, being a trespasser, the defendant owed him no duty under said sec. 2394—48, *supra,* and that there was therefore no liability on its part. He also held that there was contributory negligence on the part of the plaintiff both in undertaking to ride up alone, being in entire ignorance of the working of the elevator, and also in failing to step off from the same before the injury. Upon such holding the court directed judgment in favor of the defendant *Morrow Milling Company,* notwithstanding the verdict, and dismissed the complaint upon the merits, with costs and disbursements; such ruling being without consideration of or prejudice to defendant's motions subsequent and relating to the special verdict. From judgment so ordered plaintiff has appealed.

For the appellant there was a brief by *William L. Tibbs,* attorney, and *Glicksman, Gold & Corrigan,* of counsel, all

of Milwaukee, and oral argument by *Mr. Tibbs* and *Mr. W. D. Corrigan.*

For the respondent there was a brief by *Williams & Stern* of Milwaukee, and oral argument by *Burdett F. Williams.*

ESCHWEILER, J. The safe-place employment statutes quoted above have undoubtedly broadened the field of those to whom there is and was a common-law duty to keep such premises as are here involved reasonably safe so as to now protect and include those upon such premises under the rights belonging to the class described under the somewhat vague and indefinite term of "licensees."

Plaintiff contends that he was at the time of the injury such a licensee, that is, there with the implied consent of the defendant *Milling Company,* or that at least the court should not have disposed of such question as a matter of law, as it did, but should have submitted to the jury a question framed so as to require them to determine whether or not, under the facts and circumstances, the plaintiff was a frequenter or a mere trespasser. It is urged in that behalf that the testimony showed such a known customary use of said premises by others than plaintiff sufficient to support a finding of a jury that the plaintiff was within the class of licensees rather than that of trespassers.

The record, however, discloses that most of the testimony relied upon by plaintiff appellant as to the former use of such elevator was admitted as against the defendant Tophooven, plaintiff's employer, only, and while the action was still pending as to him, and mostly as to a period prior to the ownership and occupancy of the premises by the defendant corporation. Even were the testimony so received admissible as against defendant respondent, a point which it is not now necessary to pass upon and which is therefore not decided, still it is not sufficient, in our judgment, as a basis for a conclusion by a jury that there had been a customary use of the premises for such purposes, and known

to defendant, as plaintiff was making at the time of the injury.

It had been used by persons other than employees of the company operating the mill, such as those representing insurance companies for the purpose of inspection; those seeking employment in the mill; and those seeking proper or necessary information from employees or foremen on such premises. As against the respondent, Tophooven clearly had no authority or power to invite the plaintiff into the mill building or to get upon the elevator. There was no invitation, express or implied, extended to plaintiff by respondent on this occasion or for such purpose. There was nothing about plaintiff's employment as helper to Tophooven in the mason work on the wall of the boiler room making it necessary or convenient for plaintiff to enter the mill building or that would require defendant to anticipate his so doing; post notices warning plaintiff not so to do, or to take other steps to guard against plaintiff so doing. He was there solely for his own pleasure, purpose, and convenience. He must be deemed, under the facts and circumstances in this case, to have been a trespasser at the time of the injury and to be doing what he did as an invasion of the owner's rights of possession and privacy on his own premises. Such an invasion of the owner's rights is a trespass irrespective of what may have been the intentions of him who so invades the premises. The act is none the less a trespass though it be done innocently and without any wilful intent to harm or violate the owner's rights. 29 Cyc. 444; *Zartner v. George,* 156 Wis. 131, 145 N. W. 971.

The trial court was right in his disposition of the case upon this point, and it makes it therefore unnecessary to consider the other questions raised and discussed.

By the Court.—Judgment affirmed.

BENESCH, by guardian *ad litem*, Respondent, vs. PAGEL, Appellant.

May 5—June 1, 1920.

Automobiles: Negligence: Minor driving automobile: Violation of statute: Collision with another vehicle: Proximate cause.

The driving of an automobile on a public street by a boy fourteen years of age, unaccompanied by an adult person, in violation of sec. 1636—49, Stats., will not prevent a recovery for injuries sustained by him in a collision with another automobile, where there was no causal connection between the violation of the statute and the collision and the boy was guilty of no negligence contributing to the accident.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

On December 25, 1916, the plaintiff, a boy fourteen years of age, was driving an electric automobile belonging to his mother on a public street in the city of Milwaukee, unaccompanied by an adult person. At a street intersection defendant's automobile collided with the one driven by plaintiff. This action was brought to recover the damages resulting from such collision. The jury found that the defendant's negligence was the proximate cause of the injury; that the fact that the plaintiff was not accompanied by his parent, guardian, or other adult person was not a contributing cause to the collision; that no want of ordinary care on the part of the plaintiff proximately contributed thereto; and assessed plaintiff's damages at $500. From the judgment entered on such verdict the defendant brings this appeal.

For the appellant there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

For the respondent there was a brief by *Rubin, Fawcett & Dutcher* of Milwaukee, and oral argument by *George C. Dutcher.*

OWEN, J. Sec. 1636—49, Stats., provides that no person under the age of sixteen years, unless accompanied by a parent, guardian, or other adult person, and no intoxicated person, shall operate, ride, or drive any automobile, motorcycle, or other similar motor vehicle, along or upon any public highway of this state, and sec. 1636—54 prescribes a fine for violation of such provisions, and a fine or imprisonment, or both, for a second violation thereof. It is contended by appellant that because the plaintiff was operating the automobile on a public street in violation of this statutory provision he cannot recover in this action, upon the authority of such cases as *Pizzo v. Wiemann,* 149 Wis. 235, 134 N. W. 899, and *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84. The circuit court ruled that in order to prevent recovery by the plaintiff in this action some causal relation between the violation of the statute and the collision must appear. This identical statute was under consideration by this court in *Steinkrause v. Eckstein,* 170 Wis. 487, 175 N. W. 988, where it was held that in order to prevent a recovery by a passenger in an automobile driven by an intoxicated person there must appear some causal connection between the violation of the statute prohibiting an intoxicated person from driving an automobile and the accident. If this be true where the driver of the automobile is intoxicated, what process of reasoning can justify a contrary ruling where the driver of the automobile is under the age prescribed by statute? If causal relation between the intoxication of the driver and the happening of the accident be necessary to prevent recovery in one case, how can the youth of the driver without such causal relation prevent recovery in the other? The driving of an automobile by one intoxicated and by one under sixteen years of age is prohibited not only by the same section but the identical sentence of the statute. In the instant case the jury found that the plaintiff was guilty of no negligence contributing to the accident. The case is therefore ruled by *Steinkrause v.*

Eckstein, supra, where all of the questions raised by appellant are discussed and disposed of, making further discussion here a work of superfluity.

By the Court.—Judgment affirmed.

SCHUCK, Appellant, vs. BLODGETT and another, Respondents.

May 5—June 1, 1920.

Sales: Joint adventure: Evidence.

The evidence in this case is *held* to sustain a finding of the court that a certain carload of potatoes was sold to B. individually and not to him and a corporation.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The appeal is from a judgment modifying and affirming a judgment of the civil court of Milwaukee county.

This action was brought by the plaintiff to recover the selling price of two carloads of potatoes, one sold on October 29, 1917, the other on November 14, 1917.

Peter Schuck, the plaintiff, was a produce dealer at Schleisingerville, Wisconsin, and had for many years been selling potatoes in car lots from that place. *Horace Blodgett,* one of the defendants, was in the business of buying and selling potatoes in car lots and transacted his business from North Milwaukee. The *Schroeder & Daly Company,* the other defendant, is a corporation which carried on a wholesale produce business in the city of Milwaukee. In the fall of 1917 *Horace Blodgett* and the *Schroeder & Daly Company* entered into an agreement by which they rented a warehouse in North Milwaukee for the purpose of storing and dealing in cabbage, onions, potatoes, etc. The lease extended for the seven months from October 1, 1917, to May 1, 1918. The defendants alleged that while the business lasted the *Schroeder & Daly Company* furnished the

money and *Blodgett* conducted the business; that in the meantime each of the defendants continued to carry on his and its separate business as formerly.

The plaintiff alleges that on October 29, 1917, at the special instance and request of the defendants, he sold and delivered 523 bushels of potatoes to defendants at the agreed price of $1.17 per bushel; and that on November 14, 1918, at the special instance and request of defendants, he sold and delivered 766 bushels of potatoes to defendants at the agreed price of $1.05 per bushel; that of the sums owing to plaintiff for such potatoes he has received $500, and that there is still due him the sum of $916.21.

The *Schroeder & Daly Company* admit that *Blodgett* and the *Schroeder & Daly Company* purchased 523 bushels of potatoes from plaintiff and that only $500 has been paid on this account, but deny that *Blodgett* and the *Schroeder & Daly Company* participated in the purchase of the 766 bushels of potatoes on November 14th. They admit that the firm still owes plaintiff $111.91 on the purchase of October 29th.

Horace Blodgett, in a separate answer to plaintiff's complaint, admits the purchase of October 29th, but claims that only 511 bushels of potatoes were delivered instead of the 523 claimed by the plaintiff; admits the purchase of potatoes from plaintiff on November 14th, but claims the amount purchased was 716 bushels instead of 766; alleges that at the time of these purchases he was acting pursuant to the written agreement between himself and the *Schroeder & Daly Company.* As a counterclaim *Blodgett* alleges that plaintiff owes him $3.50 on some cabbage he sold him on November 17, 1917.

The first car of the potatoes in question was shipped from Schleisingerville to North Milwaukee and its contents were placed in the warehouse used for the joint business of *Blodgett* and the *Schroeder & Daly Company* and sold therefrom. The second car was never shipped to North Mil-

waukee, but was shipped to Chicago, where it was sold to Doretti Brothers, former customers of *Blodgett*. The *Schroeder & Daly Company* alleges that the second car was bought by *Blodgett* for his personal business which he conducted aside from their joint business and that they were in no way interested in this transaction. The civil court decided that the second car, the shipment of November 14th, was sold and delivered to the joint enterprise. The *Schroeder & Daly Company* appealed to the circuit court. The circuit court, upon the record and the evidence taken in the civil court, found that the evidence failed to show any connection between the plaintiff and the *Schroeder & Daly Company* on account of the purchase of the November car of potatoes. Judgment was thereupon entered in the circuit court against the defendant *Horace Blodgett* for the aggregate unpaid price of both cars, with costs, and against the defendant *Schroeder & Daly Company* for the unpaid balance of the first car, less costs accruing to said defendant subsequent to its offer of judgment. This is an appeal from such judgment.

W. O. Meilahn of Milwaukee, for the appellant.

For the respondent *Schroeder & Daly Company* there was a brief by *Churchill, Bennett & Churchill* of Milwaukee, and oral argument by *W. H. Churchill.*

SIEBECKER, J. In this case it is held: That the circuit court correctly found as a fact that the second carload of potatoes sold by plaintiff to *Blodgett* was a sale to him individually and that *Blodgett* and the *Schroeder & Daly Company* are not liable under their joint enterprise at North Milwaukee for the purchase price thereof to the plaintiff. It follows that the circuit court properly awarded recovery in plaintiff's favor and against *Blodgett* individually and against the *Schroeder & Daly Company* for the amounts respectively indicated in the judgment.

By the Court.—The judgment appealed from is affirmed.

STENKOWICZKI, Appellant, vs. LYTLE, Respondent.

May 5—June 1, 1920.

Physicians and surgeons: Malpractice: Issuable facts: Propriety of method used: Questions for jury: Special verdict.

1. In an action against a surgeon for malpractice, a finding by the jury that defendant did not use a method ordinarily used by surgeons of good standing in the vicinity does not decide any issuable fact.
2. Testimony by several doctors that the method of treatment used to cure plaintiff's hernia was obsolete and improper, opposed by testimony of defendant's witnesses that the method used was a proper one but not much used at present, makes it a question for the jury whether defendant was negligent in his treatment of plaintiff, since negligence might be the selection of improper treatment as well as the improper use of a proper method.
3. Where the jury specially found that defendant was negligent in his treatment of plaintiff, plaintiff was entitled to judgment, though there was no finding that the method of treatment adopted by defendant was improper.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

Action for malpractice begun in the civil court of Milwaukee county. Plaintiff was affected with a hernia and was treated by defendant. He claimed that by reason of defendant's negligent and improper treatment he sustained damages. Defendant denied that he was negligent or that the treatment was improper. The jury found that (1) the defendant was guilty of negligence in the course of his treatment of plaintiff; (2) such negligence on the part of the defendant was the proximate cause of plaintiff's injury; (3) the defendant did not use a method in the treatment of plaintiff ordinarily used by physicians and surgeons of good standing of the same system or school of practice as that of the defendant in this vicinity or locality, having due regard to the advanced state of medical or surgical science at the time of the treatment; (4) no want of ordinary care on the part of plaintiff proximately contributed to his in-

jury; and (5) damages in the sum of $1,350. The civil court awarded plaintiff judgment on the special verdict, and the defendant appealed to the circuit court. It reversed the judgment and ordered a new trial on the ground that the special verdict did not include one disputed issue, namely, whether the treatment used by the defendant in ministering to the plaintiff was a proper treatment as recognized by physicians and surgeons having due regard to the advanced state of medical and surgical science. It held the third finding did not cover this issue because it did not determine whether the treatment used was a proper or improper one, irrespective of whether it was or was not one ordinarily used. If it was a proper treatment it need not be one ordinarily used. This we understand was the view of the circuit court. Plaintiff appealed from an order granting a new trial.

Martin J. Brennan of Milwaukee, for the appellant.

For the respondent there was a brief by *Henry Mahoney* and *Charles S. Thompson,* attorneys, and *Arthur F. Belitz,* of counsel, all of Milwaukee, and oral argument by *Mr. Belitz* and *Mr. Mahoney.*

VINJE, J. The circuit court correctly held that the third finding did not decide any issuable fact, but we think it erred in granting a new trial notwithstanding the defect in such finding, because the verdict is complete without it. The jury found that defendant was negligent in the course of his treatment of plaintiff; that such negligence was the proximate cause of plaintiff's injury; and that plaintiff was free from any contributory negligence and sustained damages. Such verdict, if supported by evidence, sufficiently establishes liability.

As to defendant's negligence, the evidence showed that he used what is termed an injection method to cure hernia. It seems from defendant's testimony that the idea is that by injecting a fluid into the tissues in or adjacent to the upper

inguinal ring inflammation sets up, which when it subsides may cause adhesions closing up the ring or opening, thus preventing further hernia. Several doctors of unquestioned repute and experience testified that such method was obsolete, was no good; that it was not a proper method; that it was absolutely the wrong treatment, and that plaintiff's injuries were due to the treatment administered by the defendant. Several doctors on behalf of defendant testified that the treatment was a recognized or proper one but not much used at present. Under such state of the evidence it was a jury question whether defendant was negligent in the treatment of plaintiff. The first finding established such negligence, for negligence in the course of a treatment may consist in the adoption of a wrong method of treatment, as here testified to, or it may consist in the negligent application of a proper method, not here claimed to be the case. So the jury in answer to the first question found that the doctor adopted an improper method of treatment, and the third question therefore becomes wholly immaterial. The defect therein did not in any way affect the answer to the first question, which with the answers to the second, fourth, and fifth questions makes a complete verdict.

By the Court.—Order reversed, and cause remanded with directions to affirm the judgment of the civil court.

KRAMER, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILWAY COMPANY, Appellant.

May 6—June 1, 1920.

Automobiles: Collision with street car: Contributory negligence: Violation of statute: Proximate cause: Trial: Instruction as to negligence.

1. In an action for injuries received in a collision between an automobile and defendant's street car, where the defense was that plaintiff violated city ordinances as to carrying lights and the manner of turning in the streets, etc., the court

erred in not charging the jury, in connection with the special issue as to contributory negligence, that a violation of such ordinances was negligence as a matter of law.

2. A violation of a city ordinance regulating the use of automobiles does not prevent recovery in case of accident, unless such violation, which is negligence as a matter of law, proximately contributed to the injury.
3. It was error for the court not to submit to the jury the issue as to whether or not there was a light on the automobile, as required by the ordinance, although defendant's motorman testified that he saw the automobile when a considerable distance away, where the jury negatived such testimony by a finding that he did not keep a proper lookout.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

The plaintiff operated a garage and automobile repair shop on the west side of First avenue between South Pierce and Park streets in the city of Milwaukee. On the evening of January 30, 1917, he had just finished repairs upon a Ford automobile belonging to one Aidich. At the request of Aidich plaintiff started to take the repaired automobile out of the garage and run it to the east side of the street so that the owner might proceed with it from there. Aidich opened the garage door and the plaintiff backed the automobile out of the garage, crossed the sidewalk and on to First avenue.

There is dispute in the testimony as to just what was then done from this point, but he did reach the more easterly or north-bound tracks of the double track maintained by the defendant street car company in First avenue. He was struck by a street car approaching from the south while he was on such north-bound track and while he was either proceeding to the north from the point where he entered upon such track, according to his evidence, or was backing south from such point, according to defendant's evidence.

In the complaint in the civil court, where the case was tried by a jury, plaintiff alleged several grounds of negligence.

By way of special defense the defendant alleged certain ordinances of the city of Milwaukee substantially as follows:

Sec. 1216, that the driver of a vehicle, when starting, shall first see that there is sufficient space free from other vehicles so that the proposed start or turn may be safely made.

Sec. 1219, providing that a vehicle passing from one side of the street to the other shall do so in a certain uniform curve, illustrated by a diagram, so as to bring the vehicle to the opposite side of the street and facing in the opposite direction from that in which it was originally traveling.

Sec. 1221, that no vehicle shall stop with its left side to the curb.

Sec. 1227, requiring a signal to be given to those behind when slowing up or stopping.

Sec. 1231, that street cars shall have the right of way along such street-car tracks between cross streets over all vehicles moving in the same direction, and the driver of any vehicle proceeding upon the track in front of the street car shall turn out as soon as possible upon signal.

Sec. 1234, that no person driving a vehicle on any street shall drive at a speed greater than reasonable or proper.

Sec. 1242, requiring that vehicles on the highway, whether stationary or not, shall keep lights so displayed as to be visible from the rear and front of such vehicle during the time specified therein.

Sec. 1257, providing penalties for punishment by fine for the first violation of any such ordinances and by imprisonment for a second.

Defendant then asserted a violation by the said plaintiff at the time of the injury of such prohibitory ordinances respectively.

Before the submission of the special verdict the defendant requested that there should be submitted questions em-

bracing the issues as to whether or not there had been violations by plaintiff of the provisions of said secs. 1216, 1219, 1231, and 1242, above cited, and, in case such failure should be found by the jury, whether any such failure was a proximate cause of the collision.

The special verdict as submitted and answered by the jury was as follows:

(1) The motorman of the street car failed to keep a proper lookout as he approached the point of collision.

(2) There was a want of ordinary care by the motorman in so failing to keep a proper lookout.

(3) Such want of ordinary care was the proximate cause of the injury.

(4) The street car approached the point of collision at an unreasonable and dangerous rate of speed.

(5) Such rate of speed was the proximate cause of the injury.

(6) The street car was traveling at the rate of eighteen miles per hour immediately before application of the brakes.

(7) No want of ordinary care by plaintiff proximately contributed to his injury.

(8) Plaintiff's damages assessed at $475.

The usual motions being made after verdict, the trial court denied those of defendant and granted judgment for the plaintiff for the amount of the verdict, with costs and disbursements, and from the judgment entered in accordance therewith in the civil court the defendant appealed to the circuit court.

Upon hearing had there, the judgment of the civil court was affirmed, and from a judgment in accordance with such decision the defendant has appealed.

For the appellant there was a brief by *Edgar L. Wood,* attorney, and *A. L. Gardner,* of counsel, both of Milwaukee, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *Arthur J. Pellette,* all of Milwaukee.

ESCHWEILER, J. In charging the jury upon the seventh question, as to whether plaintiff was guilty of any want of ordinary care proximately contributing to his injury, the trial court recited the substance of all but one of the city ordinances above quoted, but did not inform them that under the law of this state any violation of such provisions was to be considered as negligence as a matter of law. Neither did the court submit to the jury, as requested by defendant, any separate questions involving the issues as to whether or not there had been such violations by plaintiff of the respective ordinances. Whether separate questions involving such rules of the road should be submitted in a special verdict need not here be determined. But whether so submitted or when embraced in the more general questions involving the negligence of any party to such a lawsuit, the jury should be charged in connection therewith that a violation of such a rule is negligence as a matter of law. It is then for the court or jury to determine if such negligence proximately contributed to the injury. *Steinkrause v. Eckstein,* 170 Wis. 487, 175 N. W. 988. This was not done in the instant case, and upon the record we deem it prejudicial error.

The motorman testified that, while the street car was a considerable distance away, he saw the automobile as it was backing out of the garage and crossing the sidewalk. The jury, however, found by their answer to the first question of the special verdict that the motorman failed to keep a proper lookout. The trial court omitted in his charge to the jury any reference to the ordinance sec. 1242, *supra,* pleaded by defendant, which requires the having of a light visible on both the front and rear end of an automobile at the hour of the evening involved. It seems to have been considered that the submission of any question or the giving of an instruction concerning or with reference to the alleged violation of that particular ordinance was rendered unnecessary in view of such testimony of the motorman,

under the view that there would be no need of any notice being given by the use of such light, he having already discovered the presence of the automobile independently of any such light. The jury, however, negatived the keeping of a proper lookout by the motorman. This, inferentially at least, amounts to a finding that the motorman did not see the automobile any appreciable time before the collision, and thus in effect discredits his testimony that he did so see it.

In such a situation defendant was entitled to have the determination of the jury upon the material and disputed issue of fact as to whether or not there was such a light. *Yahnke v. Lange,* 168 Wis. 512, 170 N. W. 722.

It follows that the judgment of the circuit court must be reversed and a new trial granted.

By the Court.—Judgment reversed, and the cause remanded with directions to grant a new trial in the circuit court.

JAEGER, Respondent, vs. SALENTINE and another, Appellants.

May 6—June 1, 1920.

Master and servant: Son driving automobile of father: Negligence: Liability of father.

The son of an automobile owner, who was the only member of the family who could safely operate the car and who was permitted by his father to drive when requested by any other member of the family, was the agent of his father in conveying his sister to town with his father's knowledge, and the father is liable for injuries to another resulting from the negligence of the son.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action for damages resulting from an automobile collision. The evidence shows that *Christ Salentine* lives with

his family on a farm near the city of Waukesha. On December 5, 1918, his daughter, who was a nurse in a Milwaukee hospital, was at home on a visit. *Christ Salentine* knew that she was home only for the day and that she must return that evening. He owned an auto which had been purchased for family use. He knew that his son would take Celia in the car either to Milwaukee or to Calhoun, where she could take the train to Milwaukee. *Christ,* the father, testified that *Peter,* the son, sometimes took the daughters out in the machine and drove them to different places and that he had done that frequently; that he had driven his mother and sisters around frequently; that when they wanted to go anywhere they simply went and that was the end of it, and that he never made any objection. *Peter,* the son, testified that he had frequently taken different members of the family around prior to the date of the collision; that he was the only one on the farm that could safely operate the car; that on the evening in question he took his sister Celia to Milwaukee, because she asked him to, and that his sister Ameela rode with them; that Celia was a nurse in a Milwaukee hospital, came home about 2 o'clock in the afternoon, and that she had to return before 10 o'clock that night. The evidence shows that the Salentine car was being driven along Scott street in the city of Milwaukee, between Fifteenth and Sixteenth avenues, at a high rate of speed; that a wagon was being unloaded at the south curb on Scott street, which projected into the street some ten feet. The Salentine car was obliged to go around this wagon and, in so doing, got well out towards the center and probably on the wrong side of the street, and at a point about 118 feet from the wagon the Salentine car collided with the plaintiff's car on the north side of the street, where plaintiff's car was lawfully traveling, inflicting personal injuries upon the plaintiff.

The jury by its special verdict found *Peter Salentine* guilty of negligence in the management of the car which

proximately contributed to the injury, absolved the driver of plaintiff's car from contributory negligence, and assessed plaintiff's damages at $600. Judgment was rendered on the verdict, and the defendants appealed.

Edward H. Hibbard of Milwaukee, for the appellants.

For the respondent there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Walter D. Corrigan.*

OWEN, J. The special verdict in this case, so far as it relates to the negligence of the parties, is well supported by the evidence, and that question requires no treatment. The further question is whether *Christ Salentine,* the father of *Peter,* who was driving the car, is liable in this action. The jury found that the defendant *Peter Salentine* was the servant and agent of the defendant *Christ Salentine* in running the automobile at the time of the collision, and that while he was driving the automobile he was acting within the scope of his employment. We think the evidence set forth in the statement of facts brings the case well within the rule of *Schaefer v. Osterbrink,* 67 Wis. 495, 30 N. W. 922, and that the question of *Christ Salentine's* liability must be answered in the affirmative upon the authority of that case.

By the Court.—Judgment affirmed.

PRINGLE, Appellant, vs. JACKSON FENCE COMPANY, Respondent.

May 6—June 1, 1920.

Master and servant: Tender of resignation: Wrongful discharge: Compensation.

Where a salesman, before the expiration of his contract, requested by letter that his resignation be accepted, such tender of resignation was not a breach of contract; and the employer's reply that the salesman had breached his contract by

writing the letter of resignation was a wrongful discharge justifying recovery of salary, commission, and expenses up to the time the resignation was to take effect.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

Action begun in the civil court of Milwaukee county to recover compensation for services rendered the defendant under a contract of employment beginning July 1, 1915, and terminating July 1, 1917. Plaintiff was a traveling salesman selling products of the defendant's factory, consisting of fence, gates, and structures. On March 1, 1917, he wrote the defendant to the effect that owing to the higher prices and the consequent falling off in trade he was of the opinion that the other salesmen in Wisconsin could take care of all the business of defendant therein, and stated: "Please accept my resignation to become effective April 1." On March 7th defendant wrote him:

"Upon my return to the office after an absence of three weeks I find your letter of March 1st tendering resignation, which of course constitutes a breach on your part of certain contract made with this company and dated May 31, 1915, covering services for two years from July 1, 1915, hence relieves us of obligation on our part of fulfilling terms of same, and we will accept your resignation to become effective as per date of your communication, namely, March 1, 1917."

This letter was received by plaintiff March 10th, up to which time he had continued to sell goods for defendant. After that date he could make no sales because the trade had been notified by defendant that he was no longer in its employ. He sought to recover for salary, expenses, and commissions up to April 1, 1917, and this the trial court permitted him to do on the ground that, though the plaintiff had no right to resign, he believed he had, and in any event it was the duty of defendant to inform plaintiff that it did not accept his resignation and would hold him to the terms of his contract; that it had no right to discharge him under

the circumstances; and judgment was entered for plaintiff for a balance due after deducting a counterclaim concerning which there was no dispute. Defendant appealed to the circuit court. There plaintiff's claim was disallowed because he had breached his contract, and judgment went for defendant on its counterclaim. Plaintiff appealed.

For the appellant the cause was submitted on the brief of *Alexander & Burke* of Milwaukee.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, all of Milwaukee, and oral argument by *J. V. Quarles.*

VINJE, J. The civil court did not make formal findings of fact as it should have done, but it is evident from its written decision that it found that plaintiff did not breach his contract in his letter of March 1, 1917, by asking defendant to accept his resignation to become effective April 1st next. We think this finding is sustained by the facts and should not have been set aside by the circuit judge. Defendant's declaration in its letter that plaintiff's request to have his resignation accepted constituted a breach of the contract is a mere erroneous conclusion of law that bound neither party. Defendant should have done what the trial court suggested—either accepted the resignation as requested or refused to do so. Had it done the latter, the plaintiff might have continued in his employment till the contract was completed. Had he not, then he would have breached it. Plaintiff's letter must be construed as a mere request to have the contract terminate April 1st, which if refused bound him to continue in the employment. It follows that defendant wrongfully discharged plaintiff and that the latter is entitled to recover his salary, commissions, and expenses up to April 1, 1917, as the trial court found.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the civil court.

SINGER, Appellant, vs. MILLARD, Respondent.

May 7—June 1, 1920.

Guaranty: Conditional sale of stock of goods: Election of remedy by seller: Release of guarantor.

Where plaintiff entered into an agreement with a third person to sell conditionally a stock of merchandise for $3,200, to be paid $100 in two weeks and the remainder in equal instalments of $200 each month, and defendant guaranteed payment of the first five instalments of $200 each, plaintiff could not recover from defendant, where, after payment of the first $200 instalment, the buyer abandoned the property and plaintiff rescinded the contract, took possession of the merchandise and sold it in regular course, and in every way treated the property as his own. *Wiedenbeck-Dobelin Co. v. Anderson,* 168 Wis. 212, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Guaranty. January 7, 1919, the plaintiff entered into a written agreement with one Frank E. Cook, whereby the plaintiff agreed to sell to Cook a stock of merchandise, implements, furniture, and fixtures for $3,200, to be paid $100 in two weeks, the remaining $3,100 to be paid in even and equal instalments of $200 on the 22d day of each month until the full purchase price with interest should be paid. The defendant executed the following guaranty:

"For value received and in consideration of one dollar to me in hand paid, receipt whereof is hereby confessed and acknowledged, I hereby guarantee the payment of the first five instalments of $200 each on the contract executed this day between *John Singer* and Frank Cook to the said *John Singer.*"

Cook made the first payment of $200 which became due February 22, 1919, but defaulted on the second payment, due March 22d. The contract by which the plaintiff agreed to sell the property to Cook was a conditional sales contract. Cook abandoned the property on the 4th day of March, in the forenoon. In the afternoon of that day the plaintiff

took possession of the restaurant and all the property covered by the conditional sales contract, and continued to conduct the business the same as when he entered into the contract with Cook, sold the merchandise in regular course, and in every way treated the property as his own.

The case was tried in the civil court of Milwaukee county. The trial court concluded that, by taking possession of the property in the manner that he did, the plaintiff rescinded and canceled the conditional sales contract, and thereby discharged the defendant's obligation on his contract of guaranty. On appeal to the circuit court the circuit judge affirmed the decision of the civil court, and from the judgment of the circuit court the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Alexander & Burke* of Milwaukee, and for the respondent on that of *Raymond J. Cannon,* attorney, and *Bernard V. Brady,* of counsel, both of Milwaukee.

ROSENBERRY, J. The plaintiff contends that under *Wiedenbeck-Dobelin Co. v. Anderson,* 168 Wis. 212, 169 N. W. 615, and *Defiance M. Works v. Gill,* 170 Wis. 477, 175 N. W. 940, the plaintiff's remedies were cumulative, and that he therefore had a right to pursue either or both, and that his conduct in taking possession of the property after the default of Cook did not amount to a rescission of the contract.

In the *Wiedenbeck-Dobelin Case* the vendor, under the conditional contract of sale, brought suit upon the notes, thereby affirming the contract. It then proceeded to satisfy its claim out of the property covered by the contract. This did not constitute a rescission, and distinguishes that case and other cases cited from the present case. The plaintiff in this case did not assert his right to satisfy the unpaid purchase price out of the property, but took possession of the entire property, treating it as his own, and in addition to that sought to enforce payment of the purchase price. These

remedies are inconsistent. Taking possession of the property and selling it and applying the proceeds upon the indebtedness is one thing. Taking possession of the property and treating it as one's own and as if the contract had never existed, is quite another thing. *Tufts v. Brace,* 103 Wis. 341, 79 N. W. 414. See, also, note in L. R. A. 1916A, 915.

By the Court.—Judgment affirmed.

HARRINGTON, Respondent, vs. LEGGE, Appellant.

May 7—June 1, 1920.

Physicians and surgeons: Action to recover compensation: Evidence.

In an action by a surgeon, under an annual contract with a railroad company to treat its employees, to recover compensation for performing an operation on a railroad laborer, the evidence is *held* to establish an agreement that the laborer should pay personally for the operation, and not the railroad. OWEN, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This action was brought in the civil court of Milwaukee county by plaintiff, a physician and surgeon, to recover for services as such.

Plaintiff was under a yearly contract with the Chicago, Milwaukee & St. Paul Railway Company to treat all injured employees of that company in and about the city of Milwaukee who came to him for treatment and who had been injured while working in the course of their employment for the railroad company, without charge to such employees individually.

Defendant testified that he had been employed as section-hand for such railroad company in its yards within the city of Milwaukee for several years, and on Thursday, May 10, 1917, while assisting other section-hands in moving a rail-

road frog, he felt a severe pain in his groin as a result of a rupture. That he was compelled to desist from heavy work for that day, but remained about the work until the usual quitting time, and went back on the two days following although not then able to perform his usual duties so far as any heavy manual work was concerned. There was evidence from some of his co-employees as to his complaining of pain at the time in question and desisting from work.

On Saturday evening he walked a considerable distance to plaintiff's office accompanied by an interpreter, a friend of his, but who died before the trial. Practically all the conversation then had was through this interpreter.

Plaintiff testified that, on defendant's stating his employment by the railroad company, plaintiff inquired as to whether or not defendant had sustained an injury while so employed. That defendant stated that he had not been so injured, but that the trouble of which he complained had been of some standing and that he had been unable to get any such slip or certificate from the foreman of the crew with which he was employed to present to plaintiff as the company's physician in accordance with the custom. That plaintiff then informed defendant that his trouble was of such a nature that it did not come within the scope of plaintiff's employment by the railroad company and that he could not look after the case on the company's account, but that if defendant was not satisfied with such conclusion as to the matter, he, defendant, might confer with the claim agent of the railroad company on the following Monday morning. That defendant then inquired as to whether or not plaintiff would look after the case as a private case and as to what it would cost. The plaintiff then told defendant that if he desired to be treated as a private patient plaintiff would perform the operation for rupture on the following Monday morning at St. Mary's hospital, to which he was accustomed to take his private patients, rather than to the hospital where operations on the railroad account were performed,

and that he would charge $50 instead of his customary charge of a larger amount, and that in addition to such sum the defendant would be required to pay the hospital expenses. That defendant then and there agreed that that should be done, returned on Monday morning, and was then taken to the hospital and there operated upon. Plaintiff took subsequent care of him while in the hospital and finally discharged him as cured on June 26th.

Plaintiff further testified that there was disclosed by the operation that the rupture was of longer standing than from the preceding Thursday, and also that if defendant's contentions as made on the trial were correct as to the manner in which the rupture was sustained, by heavy lifting, the pain would have been so severe that defendant would have been unable to do anything on the same day on which it occurred. There was testimony from another physician called by plaintiff as a medical expert to the same effect, and no medical evidence offered by the defendant to the contrary.

Defendant testified that the agreement between them was that if he had been injured by the company the operation would be free to him; that if he was injured somewhere else he himself must pay. That he was to be operated upon the following Monday, and that if it was had at his expense the plaintiff was to charge him but $30, instead of the $50 as claimed by plaintiff. That he paid the hospital bill and that the same was subsequently refunded to him by the St. Paul Railway Company, with which he made a settlement on his claim for compensation for such injury in the following August.

The case was tried in the civil court without a jury, and during the cross-examination of plaintiff the trial court said: "This whole case then really simmers down to the interpretation that should be put on the word 'injury,' doesn't it?" the plaintiff replying that the contract was not subject to any such condition or interpretation. There is nothing fur-

ther in the record to indicate the view that the trial court took as to the issue of fact to be determined in arriving at his decision that the complaint should be dismissed and judgment directed for the defendant. From the judgment in favor of defendant, plaintiff appealed to the circuit court. The circuit court reversed the judgment of the civil court and directed the entry of judgment in favor of the plaintiff for the sum of $50, with interest and costs. From such judgment of the circuit court the defendant has appealed.

Raymond J. Cannon of Milwaukee, for the appellant.

For the respondent the cause was submitted on the brief of *Frank H. Hannaford* of Milwaukee.

ESCHWEILER, J. We think it clear from the record that the trial court took a mistaken view as to the real issue between the parties, and that the circuit court was correct in holding that the testimony was clear and positive that there was an agreement between the parties that the defendant was to be operated upon by plaintiff for the hernia, and for the sum of $50 to be paid by defendant personally, and that pursuant to such agreement defendant returned to plaintiff on the Monday morning rather than try to make arrangements with the claim agent of the railroad company to have the operation performed at its expense. The judgment of the circuit court must therefore stand.

By the Court.—Judgment affirmed.

OWEN, J. (*dissenting*). As to the agreement between the plaintiff and defendant the defendant testified: "We agreed if I was injured by the company that I would get the operation free; if I was injured somewhere else I must pay." As to the time and manner in which he was hurt he testified:

"I was injured in the month of May, 1917, while working for the railroad company. I was hurt while lifting a frog and then I noticed a sharp pain (indicating groin). At the time I felt this pain I noticed something in the region of the

groin, a lump was here on the side; it was never there before; it was the first time I noticed it. I had pain when I felt that lump come out of my groin; I couldn't go no place. After I felt that, I went to the plaintiff because I knew he was the physician of the St. Paul Railroad Company."

Three witnesses testified that they were working with defendant at the time he was hurt; that "he was lifting a sixteen-foot frog to put it on a handcar, and he was hurt and they could not go with him and they left him there. He had a pain in the groin and he couldn't walk."

I do not understand why this evidence does not raise an issue as to whether defendant was injured while in the employ of the railroad company, notwithstanding the testimony of the plaintiff physician that the "rupture was of longer standing than from the preceding Thursday, and also that if defendant's contentions as made on the trial were correct as to the manner in which the rupture was sustained, by heavy lifting, the pain would have been so severe that the defendant would have been unable to do anything on the same day on which it occurred." *Banner C. Co. v. Billig,* 170 Wis. 157, 174 N. W. 544; *E. Weiner Co. v. Freygang, ante,* p. 187, 176 N. W. 781.

Defendant's testimony with reference to the agreement, above quoted, also raises an issue as to what the agreement was between plaintiff and defendant. To my mind the record presented a controverted issue of fact upon which there was evidence sufficient to sustain the findings of the trial court, and its judgment should have been affirmed by the circuit court.

AMERICAN STEAM LAUNDRY COMPANY, Respondent, vs. RIVERSIDE PRINTING COMPANY, Appellant.

May 7—June 1, 1920.

Contracts: Agreement to furnish steam to laundry: Duration: Termination: Mutuality: Parol evidence: Reformation of instruments: Trial of issue: Damages: Loss of profits: Proof.

1. In a contract whereby defendant agreed to furnish steam for plaintiff's laundry, a clause that the steam was to be furnished to plaintiff while in the building occupied by it expressed duration of the contract, not a condition of performance of obligations agreed upon; the word "while" expressing the idea of duration when read in connection with the clause immediately following it.
2. The agreement is not void for indefiniteness as to time, though the time for continuance of the contract is not definitely specified, and hence the contract is not terminable at the will of either party.
3. Such agreement to furnish steam at a specified monthly rate obligated plaintiff to pay for the steam at the specified rate so long as it occupied the building, so that defendant could not avoid liability thereon for want of mutuality.
4. Where a contract as written is free from ambiguity when applied to the subject matter of the transaction, parol evidence is not admissible to ascertain and explain its terms.
5. Where defendant's answer alleged that the agreement to furnish steam was limited to the time defendant also occupied its premises and that such agreement was, through mutual mistake, omitted from the written contract, defendant was entitled to litigate the issue of right to reformation for mistake.
6. Loss of profits, to be recoverable, must be capable of ascertainment with reasonable certainty, and plaintiff cannot recover for loss of profits by loss of customers, in addition to extra expense for furnishing its own steam, in the absence of evidence that the loss was solely caused by the breach.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was brought by plaintiff to recover damages for alleged breach of contract. Plaintiff claims that there was a written contract between it and defendant by which

defendant agreed to furnish plaintiff with live and exhaust steam for the operation of its laundry. It is plaintiff's contention that the contract provided that defendant should furnish this steam as long as plaintiff occupied certain premises adjoining or near the premises on which defendant conducted its printing business. Defendant claims that the contract required it to furnish the steam only as long as defendant occupied the premises on which it was then conducting its printing business.

The contract was dated March 1, 1911. On April 1, 1914, defendant moved its business from the premises near plaintiff, and thereupon ceased to furnish steam to plaintiff. Plaintiff continued to occupy its laundry premises until the expiration of its lease on December 31, 1915.

Plaintiff claimed damages in its complaint (1) for the amount it expended in preparing and equipping its premises for the use of such steam under the contract; (2) for the amount of the expense of altering its premises and installing its own steam plant after defendant ceased to supply steam; (3) for the amount of increased expense of producing its own steam and operating its laundry therewith; (4) for loss of profits sustained in its business from the time defendant ceased to supply steam to the termination of its lease, December 31, 1915; and (5) for the loss of prospective profits subsequent to December 31, 1915.

Defendant's answer alleged that the contract is void for want of mutuality and consideration except in so far as the same has been executed by the parties; that it was understood between the parties that defendant could not and would not furnish steam for any longer period than during its occupancy of the premises used for its printing business; that it ceased to furnish steam for the reason that it was obliged to move from these premises; that it did so with plaintiff's consent, and that said agreement then terminated by the mutual consent and agreement of the parties; that plaintiff prepared and produced the contract in question and

represented that it correctly evidenced the oral understanding of the parties; that the words "while in the building," etc., were not understood by either party to state or define the period for the continuance of the agreement; that if such words are to be construed as imposing upon defendant the duty of supplying steam as long as plaintiff remained in its premises, such words were included by and through mutual mistake of the parties or by the fraud of the plaintiff and the mistake of defendant; that the contract should be reformed.

The case was tried to the court and a jury. At the close of the testimony the court held that matters respecting the construction and validity of the contract were questions of law for determination by the court and would be taken under advisement, and submitted all of the other issues to the jury.

The jury found in a special verdict that plaintiff did not consent to defendant's ceasing to furnish the steam for its business, nor did it waive its right to be furnished steam by defendant after March 31, 1914; that defendant's failure to furnish the steam caused plaintiff damages by way of loss of profits.

After verdict the court considered the questions which had not been submitted to the jury by special verdict and held that the defendant was liable for breach of contract. The court expressly construed the contract "as obligating the defendant to furnish live and exhaust steam to the plaintiff for its use while, or so long as, the plaintiff used and occupied the building at 210-212 Third street as a steam laundry, namely, until January 1, 1916; that the contract is not void for want of mutuality, but is valid and binding."

Judgment was entered in plaintiff's favor awarding it recovery of the damages fixed by the jury. From this judgment defendant appeals.

For the appellant there was a brief by *N. L. Baker & W. J. Zimmers* of Milwaukee, and oral argument by *Mr. Baker*.

For the respondent there was a brief by *S. M. Williams,* attorney, and *Williams & Stern,* of counsel, all of Milwaukee, and oral argument by *Burdett F. Williams.*

SIEBECKER, J. It is contended by the defendant that the court erred in holding that the clause in the contract declaring that defendant was to furnish plaintiff steam "while in the building occupied and used by them as a steam laundry, being building numbered rear 210-212 front Third street," defined a period of time for which steam was to be furnished.

The words of this clause are to be construed and understood in their ordinary and common acceptation when applied to the subject in relation to which they are used and the facts and circumstances of the transaction. The word "while" as here employed clearly expressed duration and not a condition of performance of the obligations agreed upon. The word "while" expresses the idea of duration when read in connection with the clause immediately following it, which specifies the facts which determine this duration of time, namely, the period of occupancy and use by the plaintiff of its building as a steam laundry. The terms of this clause, when applied to the subject matter in view of the facts involved in the transaction, indicate that the time of the contract is dependent upon the event of use and occupancy of the building by plaintiff as a laundry. The omission to specify the time presently definite for the continuance of the contract does not, however, make the contract void for indefiniteness as to time, and hence it is not terminable at the will of either party. *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, 122 N. W. 1023; *Treat v. Hiles,* 81 Wis. 280, 50 N. W. 896.

The trial court properly concluded that the contract as written is free from ambiguity when applied to the subject matter of the transaction. Parol evidence, therefore, was not admissible to ascertain and explain the terms in which it is written.

It is contended that the agreement of the parties is not binding on them for want of mutuality. The terms of the contract are in substance and effect that the defendant, in consideration of the specified payments to be made by plaintiff, "agrees to furnish" to plaintiff "exhaust and live steam for its use while in the building occupied and used" by plaintiff as a steam laundry, "at the rate of $30 per month during the first year and $35 per month or part of a month thereafter." It is also agreed that all work and material required for conveying the steam from defendant's premises to plaintiff's laundry are to be furnished by plaintiff at its cost and expense. It is without dispute that the plaintiff entered upon the execution of the contract by putting in the necessary pipes to conduct the steam from defendant's plant to the laundry and made the required connections to make the steam available in its business. Steam was furnished under contract from April 10, 1911, to April 1, 1914, when defendant moved to another location and discontinued the steam supply. The defendant urges that the plaintiff did no more than promise to pay for the steam when it was furnished, and that the terms of the agreement do not imply that it would take steam as long as it occupied the premises.

As we have above shown, the terms of the contract fix a time during which the steam was to be supplied. The plaintiff promised to put in the necessary piping and connections to enable the defendant to supply the steam for making it available to plaintiff and to pay the price agreed upon. The facts and circumstances involved in the transaction throw light on the meaning of the agreement and are helpful in arriving at the intent of the parties embodied in this writing. Courts are not deprived of the benefit of the conditions in which the parties acted when the contract was executed, but may look into the transaction from the viewpoint of the parties so as to aid them in ascertaining the meaning of the terms of the agreement and apply them to the subject matter it embraces. Considering the agreement

in view of the circumstances shown, it is manifest that from the promises made by the respective parties it was their intention that the obligation assumed by either implied the assumption of the correlative obligation of the other. The terms of this contract recognize that plaintiff was to assume payment of the cost and expense in making the steam available and pay the stipulated price, and that it was to be entitled thereto upon the terms defendant agreed to furnish it for the period fixed in the contract. It is considered that the agreement in its terms, when applied to the transaction the parties were dealing with, shows mutual obligation and makes the contract enforceable by each against the other. *Eastern R. Co. v. Tuteur,* 127 Wis. 382, 105 N. W. 1067; *Walsh v. Myers,* 92 Wis. 397, 66 N. W. 250; *McCall Co. v. Icks,* 107 Wis. 232, 83 N. W. 300; 1 Page, Contracts (2d ed.) sec. 583; 1 Williston, Contracts, § 140.

We think the jury's finding that plaintiff did not before March 31, 1914, consent to defendant's ceasing to furnish steam nor waive its right to have steam furnished thereafter, is amply supported by evidence.

It is alleged in defendant's answer that it was distinctly agreed by the parties that defendant was not to furnish the steam to plaintiff for any longer period than defendant occupied the premises under its lease and its use in conducting its printing business; that such express agreement was, through mutual mistake of the parties, omitted from the written contract; and demanded judgment that the contract be reformed so as to express this agreement of the parties. The record discloses that the trial court refused to receive evidence tending to show that any such agreement had been made and that it was omitted from the contract by mutual mistake of the parties. Our attention has not been directed to anything in the record that this inquiry was not a proper one to be litigated, except that, whenever any evidence relevant and material to this question was sought to be elicited by defendant, objections to its reception

were uniformly sustained by the court. The record shows that efforts to have this question determined at the trial were met by objections in every instance and that no such issues were in fact litigated. True, no specific requests were made asking the trial court to find on this question. This, however, is readily understood when it is borne in mind that all evidence defendant offered on the subject was excluded. An examination of the record convinces us that it was prejudicial error not to litigate this question as tendered by the defendant, and that justice requires that the cause be remanded to the circuit court to hold an inquest on this issue, and that the court determine whether or not defendant is entitled to have the contract reformed as prayed for.

The question of damages as assessed by the jury is founded upon the following questions of the verdict:

"(4) Did the failure of defendant to furnish plaintiff with live and exhaust steam after April 1, 1914, cause plaintiff damage *by way of loss of profits* in 1914 and 1915?

"(5) If your answer to question No. 4 is 'Yes,' then answer this question: What is the amount of plaintiff's damages by way of *loss of profits* in 1914 and 1915 due solely to defendant's failure to furnish live and exhaust steam after April 1, 1914?"

The court instructed the jury in connection with these questions that the burden of proof in the inquiries is on the plaintiff, that their answers must be supported by the preponderance of the credible evidence, and that their answer "as to the extent of *loss of profits* so caused must not rest upon mere speculation or guess, and you will not include any item or items of damages in the way of loss of profits which you find from the evidence were due wholly or in part to any other cause or causes than the defendant's failure to furnish steam." One of the elements for recovery of loss of profits is that they must be capable of ascertainment with reasonable certainty. The evidence in the case partic-

ularizes certain expenses plaintiff incurred by way of furnishing the laundry with steam apparatus and boiler and the expense of conducting the business after their installation, which were charged up in the business accounts as disbursements to be deducted from the income of the business, and thus to ascertain what is termed *loss of profits of the year's business.* It also appears that no separate finding was made by the jury to determine the amount of this class of damage so attributed to the breach of contract from other damages denominated *loss of profits.* A search of the items on which this so-called loss of profits was predicated discloses that loss of customers to the business in 1914 and 1915 was included. It is claimed that this loss was caused by imperfect laundry work due to soot specks. The plaintiff asserts that such specking was due to the fact that the smokestack operated in connection with the new steam boiler to supply steam for the laundry work had to be so located as to cause the soot to enter the laundry. The evidence lacks in definiteness and clearness to show that the loss of customers was solely caused by these conditions of installing the new apparatus and boiler. Nor can we ascertain but that the disbursements were augmented by items not incident to the ordinary conduct of the business and which may have affected the calculation made by the plaintiff in ascertaining its loss of profits. We cannot undertake any detailed examination of the items comprising the plaintiff's business for the two years 1914 and 1915. Under these facts and conditions it cannot be ascertained on what basis the jury acted in assessing the damages as loss of profits. This state of the issues on damages requires that a retrial on the question must be had. The judgment appealed from is reversed, and a new trial awarded on the issues of reformation of the contract and of damages.

By the Court.—The judgment is reversed, and the cause remanded to the circuit court for further proceedings in accordance with this opinion.

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1. An officer of a foreign corporation required by order of court to be adversely examined and to produce papers under sub. 7, sec. 4096, Stats., cannot object that his examination is being fixed at a place within some other county than that of his residence, he having no residence in the state, nor that he has not been served with subpœna within some county of the state. *Kentucky F. Corp. v. Paramount A. E. Corp.* 586

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and is not the taking of a deposition to be used as evidence on the trial; and such evidence is not admissible when offered by the party testifying, although admissible when offered by the opposite party as evidence of admissions against interest. *Lange v. Heckel,* 59

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3. Where a nonresident corporation comes voluntarily into this state to seek the remedies afforded by its courts as plaintiff against a defendant resident, it must submit to reasonable orders within the proper exercise of judicial discretion requiring it to produce documentary evidence or its officers to submit to oral examination within the jurisdiction of the court; and in the absence of a showing that such orders are made without notice to the plaintiff and an opportunity on its part to be heard, or that they are arbitrary or oppressive and require the plaintiff to do that which is beyond its power or ability to do, they will be upheld. *Kentucky F. Corp. v. Paramount A. E. Corp.* 586

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as contemplated by sec. 2594, and does not continue a provisional remedy under sub. (3), sec. 3069, and hence is not appealable. *Mantz v. Schoen & Walter Co.* 7

Same: Directing that third parties be made defendants.

2. An order made under sec. 2610, Stats., granting the application of defendant to make third persons parties defendant, is not a special proceeding as defined in sec. 2594, nor an order granting, refusing, continuing, or modifying a provisional remedy within sub. (3), sec. 3069. *Bell L. Co. v. Northern Nat. Bank,* 374

Question first raised on appeal.

3. A point not presented to the court below will not be considered on appeal to the supreme court. *State ex rel. Houghton v. Phelps,* 13

Same: Question raised after trial on the merits.

4. A judgment for the plaintiff in an action against the present director general of railroads in accordance with General Order No. 50, issued by his predecessor, will not be reversed on his appeal, though the order was contrary to sec. 10 of the railroad control act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), authorizing suits against railroads while under federal control, where the director general defended the action on the merits and first raised the question by motion for judgment notwithstanding the verdict, especially since the decisions as to the validity of the order are conflicting and the question has not been determined by the United States supreme court. *Leemans v. Hines,* 278

Same: Questions of fact not disputed at trial.

5. At the trial of an action by an employee of a railroad for injuries, a suggestion by the court, acquiesced in by defendant, that it was sufficiently shown that a certain transfer track was used indiscriminately for interstate commerce, indicates that this fact was not disputed, and the question cannot be raised by the defendant on its appeal from a judgment in favor of plaintiff. *Kalashian v. Hines,* 429

Preservation of exception: Effect of single exception.

6. A single exception to a portion of a charge containing independent propositions, some of which are proper, is too general and will be disregarded on appeal. *Suick v. Krom,* 254

Record: Return on order vacating service of summons.

7. On an appeal from an order vacating service of summons which recited that it was made on the summons, the return of service, the records and proceedings, and an affidavit in support thereof, and that an affidavit in opposition thereto was filed, no bill of exceptions was needed, and it was sufficient for the clerk to return all the original papers, although properly he should have certified that the papers returned by

him were all the originals used on the hearing of the motion. *Christian v. Great Northern R. Co.* 266

Same: Bill of exceptions served too late: Effect.

8. On plaintiff's appeal, a bill of exceptions proposed and served by defendant after the statutory period for taking an appeal had expired, with no reason shown for the delay and against plaintiff's objection, should not have been allowed and will be stricken out. *Gemert v. Pooler,* 271

Same: Extension of time to settle bill of exceptions: Condition.

9. The action of the court in requiring that an appeal be taken within a certain time as a condition of an extension of the time for the settlement of a bill of exceptions will not be considered where the bill of exceptions was taken within the required time or without prejudice to appellant, the appeal presenting nothing but a moot question. *Baraboo v. Excelsior C. Co.* 242

Same: Record not containing all the evidence. See BANKS, 2. MOTIONS.

10. It is within the peculiar province of the trial court to determine the facts to which the law is to be applied, and, where the record does not contain all of the evidence upon which a final determination of the facts must rest, an order appealed from will stand. *A. J. Monday Co. v. Automobile, A. & V. Workers,* 532

Review: Ruling, not reason for ruling, is reviewed.

11. It is immaterial what ground is assigned by the trial court for its ruling if it be in fact correct. *Haswell v. Reuter,* 228

Same: Error affecting party not appealing.

12. Where the administratrix of a mother's estate presented a claim against the estate of a deceased son, and his administratrix presented a claim against the mother's estate for the entire estate under a void agreement, and on trial of the consolidated claims the court adjudged that certain certificates of deposit belonged to another son, the question whether such certificates belonged to the mother cannot be reviewed on appeal by the administratrix of the deceased son, where the mother's administratrix did not appeal. *Estate of Salzwedel,* 441

Same: Fact practically agreed upon at trial.

13. Appellants cannot question the amount of damages allowed, where the record shows that such amount was practically agreed upon in open court by the attorneys for all parties. *Lange v. Heckel,* 59

Presumptions: Construction of evidence.

14. Upon an appeal from a judgment for plaintiff the evidence must be given every legitimate construction most favorable to his contentions. *Lange v. Heckel,* 59

Discretion of court: Refusal to grant continuance. See CONTINUANCE.

15. A judgment cannot be reversed because of the refusal of the trial court to grant an application for continuance, unless the court abused its discretion. *Will of Bilty,* 20

Same: Application to appeal from county court.

16. An application to the circuit court for leave to appeal under sec. 4035, Stats., authorizing the circuit court to allow appeals from the county court by a person who omitted to take his appeal according to law, without fault on his part, is addressed to the sound discretion of the court, and the supreme court will not reverse an order denying such an appeal unless it appears that such discretion was abused. *Will of McGinty,* 184

17. The rule of *Groner v. Hield,* 22 Wis. 200, that if the petition for leave to appeal states a *prima facie* case counter affidavits will not be considered, has been modified by subsequent decisions; but every application to permit an appeal is addressed to the discretion of the circuit court. *Ibid.*

Questions of fact: Findings.

18. It is the province of the trial court to reconcile, if possible, discrepancies in the testimony of a witness, and his conclusion will not be disturbed on appeal. *Hudson v. Trustees, etc.* 238

19. A finding by the trial court in an action to construe a will, that testator intended that a legacy was in payment of a debt of testator, will not be reversed unless the supreme court is satisfied that it was clearly wrong. *Kupsick v. Diestelhorst,* 519

20. The findings of a referee supported by the testimony must stand on appeal. *Tollefson v. Tollefson,* 149

Harmless or prejudicial error: Improper use of adverse examination. See ADVERSE EXAMINATION, 2.

21. Where the adverse examination of a party was wrongly admitted as his deposition, and he subsequently testified, and appellants had full opportunity of cross-examination but did not show any discrepancy between the testimony and deposition, the error was harmless. *Lange v. Heckel,* 59

Same: Admitting letter confirming conversation.

22. Where the testimony of the parties differed as to the substance of a conversation between them modifying a previous contract, error in admitting a copy of a letter purporting to have been written in confirmation of that conversation was prejudicial. *Federal A. Co. v. Zimmermann,* 594

Same: Evidence not affecting result.

23. Where the amount found as compensation for services rendered deceased by his niece was greatly in excess of an amount testified to by a witness as what she paid her own servant, any error in the admission of such testimony was not prejudicial. *Nelson v. Ballestad,* 162

24. Where there was much testimony of a similar nature by persons having had personal transactions with deceased, the exclusion of the testimony of a witness as to the loss of mind of testatrix and her inability to understand and comprehend ordinary details concerning business and property was not prejudicial. *Will of Keenan,* 94

Same: Voluntary withdrawal of improper evidence.

25. Error in admitting evidence deliberately offered by a party prior to adjournment of court for the day is not cured by the voluntary withdrawal of such evidence by the party on the convening of court on the next day. *Gauerke v. Kiley,* 543

Same: Error in instructions and form of verdict.

26. Error in the submission of two questions of a special verdict which were unnecessary to determine the rights and liabilities of the parties, is harmless and would not warrant the reversal of a judgment for plaintiff. *Kalashian v. Hines,* 429

27. Where four questions in a special verdict, if answered in plaintiff's favor, made a case against the defendants, and a fifth question which was submitted had no place in the special verdict, the question whether the court properly instructed the jury in submitting such fifth question will not be considered. *Lange v. Heckel,* 59

28. The questions litigated having been ultimately decided by the court contrary to the verdict of the jury, alleged errors in instructions need not be considered. *Will of Keenan,* 94

29. Appellant cannot complain of instructions which related to questions that were answered in his favor. *Dering v. Milwaukee E. R. & L. Co.* 8

Disposition of case: Error in not awarding costs. See CRIMINAL LAW, 15. LIMITATION OF ACTIONS, 2.

30. Where plaintiff was not awarded costs and disbursements, though entitled thereto, and where the amount of his costs and disbursements has not been ascertained, a judgment, though otherwise correct, will be reversed and the cause remanded to the circuit court with directions to permit plaintiff to have his costs and disbursements taxed and allowed and inserted in the judgment in his favor. *Wegner v. Sheboygan-Elkhart Lake R. & E. Co.* 325

Same: Case properly tried as to one cause of action. See BRIDGES, 1.

31. The supreme court, in reversing a judgment because of error committed upon one cause of action, will remand the case only as to such cause of action and not as to a cause of action upon which the judgment of the lower court was proper. *Neacy v. Milwaukee,* 311

Same: Case not fully tried on the merits.

32. An erroneous judgment for the plaintiff, entered without fully trying the real controversy between the parties, will be re-

versed and the cause remanded for a new trial under sec. 2405m, Stats. *Rowell v. Rhadans,* 86

Appeals to circuit court. See JUSTICES OF THE PEACE.

Appeal from order of industrial commission. See WORKMEN'S COMPENSATION, 9–11.

Affirmance and reversal. See ARSON. FIRES. TRIAL. WORKMEN'S COMPENSATION.

ARBITRATION. See EVIDENCE, 10.

ARREST. See HOMICIDE.

ARSON.

Sufficiency of evidence.

Where the only evidence supporting a verdict convicting the defendant of arson was the testimony of two witnesses to the effect that they had heard him threaten to burn the property, and testimony concerning the apparent identification of defendant's rubber boots with certain plaster casts of footprints discovered near the burned buildings, and where the witnesses who testified as to threats were manifestly actuated by animosity towards the defendant, and there was no proof that the foot-prints were made at or about the time of the fire, the conviction will be set aside. *Bruno v. State,* 490

ASSESSMENT. See TAXATION.

ASSIGNMENT of lease. See LANDLORD AND TENANT, 1.

ASSIGNMENTS.

Acceptance specifying deductions: Effect. See ESTOPPEL.

A property owner which accepted in writing an assignment of an amount due from it to a paving contractor subject to deductions arising from the filing of mechanics' liens, and stated the amount which would be due the contractor in the absence of such deductions, impliedly excluded its right to make any other deductions from the amount stated. *Merchants & M. Bank v. Terrace Realty Co.* 109

ASSUMPTION.

Of mortgage. See MORTGAGES, 1–4.

Of risk. See FEDERAL EMPLOYERS' LIABILITY ACT, 4.

ATTORNEY AND CLIENT.

Substitution of attorneys: Reservation by court of right to pass upon fees.

1. Where during the pendency of an action for damages for personal injuries sustained by plaintiff a substitution of attorneys was made upon the express condition that the right was reserved by the court to ultimately pass upon the question of what allowances should be made out of any fund subsequently to be paid on account of plaintiff's injuries, the allowance made by the court was binding upon the substituted attorneys notwithstanding their contingent-fee contract with

plaintiff providing for a greater amount. *Rubekeil v. Bowman,* 128

Same: Knowledge of court of value of services.

2. In fixing the measure of compensation to attorneys the court may properly apply his own knowledge as to the services rendered and the reasonable value thereof. *Rubekeil v. Bowman,* 128

Fees of attorneys: Allowance by court. See CORPORATIONS, 10. WILLS, 5, 6.

Income tax return by attorneys. See TAXATION, 1, 3.

ATTORNEY GENERAL. See WORKMEN'S COMPENSATION, 11.

AUCTIONS AND AUCTIONEERS.

Conditions of sale: Announcement by auctioneer. See CUSTOM. VENDOR AND PURCHASER, 4.

The conditions of a public sale announced by the auctioneer at the beginning of the sale are binding on a purchaser, though, coming late, he did not hear the announcement and did not know thereof until after he had signed the memorandum of sale. *Clarke v. Maisch,* 225

AUTHORITY of agent. See PRINCIPAL AND AGENT, 2, 3.

AUTOMOBILES.

See BRIDGES, 1. HIGHWAYS, 3. RAILROADS, 11–13. STREET RAILWAYS, 3, 4.

Negligence: Liability of parent: Agency of son.

1. The son of an automobile owner, who was the only member of the family who could safely operate the car and who was permitted by his father to drive when requested by any other member of the family, was the agent of his father in conveying his sister to town with his father's knowledge, and the father is liable for injuries to another resulting from the negligence of the son. *Jaeger v. Salentine,* 632

Same: Violation of ordinance or statute: Proximate cause.

2. In an action for injuries received in a collision between an automobile and defendant's street car, where the defense was that plaintiff violated city ordinances as to carrying lights and the manner of turning in the streets, etc., the court erred in not charging the jury, in connection with the special issue as to contributory negligence, that a violation of such ordinances was negligence as a matter of law. *Kramer v. Chicago & M. E. R. Co.* 627

3. The driving of an automobile on a public street by a boy fourteen years of age, unaccompanied by an adult person, in violation of sec. 1636—49, Stats., will not prevent a recovery for injuries sustained by him in a collision with another automobile, where there was no causal connection between the violation of the statute and the collision and the boy was guilty of no negligence contributing to the accident. *Benesch v. Pagel,* 620

4. A violation of a city ordinance regulating the use of automobiles does not prevent recovery in case of accident, unless such violation, which is negligence as a matter of law, proximately contributed to the injury. *Kramer v. Chicago & M. E. R. Co.* 627

Same: Sufficiency of evidence: Special verdict.

5. In an action for damages because of a collision between two automobiles, a finding of the jury that plaintiff was guilty of contributory negligence is sustained by evidence showing that he drove his car across a street intersection at the rate of about twenty miles an hour and speeded up somewhat to cross in front of the defendant, who had the right of way under sec. 1636—49, Stats. *Haswell v. Reuter,* 228

6. A finding in a special verdict that plaintiff was guilty of a want of ordinary care is not inconsistent with a finding that he was not guilty of a want of ordinary care with reference to the manner in which he ran his automobile at and before the time of a collision, the former finding being general and being based on the driving of the automobile at excessive speed, and the latter relating only to the manner of driving the car other than with respect to speed. *Ibid.*

7. It was error for the court not to submit to the jury a question as to whether or not there was a light on an automobile, as required by ordinance, although defendant's motorman testified that he saw the automobile when a considerable distance away, where the jury negatived such testimony by a finding that he did not keep a proper lookout. *Kramer v. Chicago & M. E. R. Co.* 627

AWARD of industrial commission. See WORKMEN'S COMPENSATION.

BANKRUPTCY. See CHATTEL MORTGAGES.

BANKS AND BANKING.

Liquidation: Jurisdiction of circuit court: Bonds held by state treasurer.

1. In proceedings to liquidate a savings and trust company, an order by the circuit court to the state treasurer, directing him to pay to the commissioner of banking a certain sum of money out of securities belonging to the company and held by the treasurer under secs. 1791*d* to 1791*i*, Stats. 1898, to be used to satisfy claims against the corporation, such order being necessary and proper to carry out the liquidation proceedings, constituted ample warrant for the state treasurer in making such payment, notwithstanding sec. 2024—77*j*, Stats. 1917, requires that such securities shall, during the existence of the corporation, remain in the state treasurer's possession until otherwise ordered by a court of competent jurisdiction. *Liquidation of Citizens S. & T. Co.* 198

2. A claim made by one who was a depositor of the company prior to the time that it came under the provisions of ch. 186, Laws 1909, that the order fails to make proper provision

as to the rights of such depositor at the time of the deposit, will not be considered or passed upon, as the record on this appeal does not present these questions. *Ibid.*

Same: Liability of commissioner of banking for rent. See LANDLORD AND TENANT, 1.

3. When the state commissioner of banking took possession of the property and business of a trust company for liquidation under sec. 2022, Stats., he became vested with title to and right of possession of the property and assets, including a lease of the premises, as liquidating agent for the benefit primarily of the company's creditors. *Liquidation of Citizens S. & T. Co.* 601

4. By taking possession of such property and assets the commissioner did not thereby accept a burdensome lease of the premises occupied by the bank, but merely became liable for the rent accruing while he held the premises—a liability which he could terminate by assigning the lease and relinquishing possession. *Ibid.*

National banks as fiduciaries. See STATES.

Acts of cashier. See REFORMATION OF INSTRUMENTS, 2.

BASTARDY.

Sufficiency of evidence.

In a bastardy proceeding, the evidence is *held* to support a conviction. *Knapp v. State,* 202

BENEVOLENT SOCIETIES. See DEATH, 1. INSURANCE.

BILL OF EXCEPTIONS. See APPEAL, 7–9.

BILL OF SALE. See CHATTEL MORTGAGES. WILLS, 3.

BILLS AND NOTES.

See EVIDENCE, 7, 10. GIFTS, 2, 3. PRINCIPAL AND AGENT, 1–3. REFORMATION OF INSTRUMENTS, 2. VENDOR AND PURCHASER. 5.

Negotiability: Judgment note: Confession of judgment authorized "at any time hereafter."

1. A promissory note authorizing any attorney to appear for the maker "at any time hereafter, and confess a judgment, without process, in favor of the holder of this note, for such an amount as may be due, and also for any amount to become due thereon," is nonnegotiable, notwithstanding secs. 1675—2 and 1675—5, Stats., the words "at any time hereafter" having reference to the delivery and not to the maturity of the note, and the note is therefore not payable at a fixed or determinable future time within the meaning of sec. 1675—1. *Wisconsin Yearly Meeting v. Babler,* 115 Wis. 289, followed; *Thorp v. Mindeman,* 123 Wis. 149, distinguished. *Clark v. Horicon State Bank,* 133

Same: Transfer of nonnegotiable note: Defenses.

2. The transferee of a nonnegotiable note takes the note subject to any defenses that might have been properly interposed by the maker if sued by the original payee. *Clark v. Horicon State Bank,* 133

Assignment of security incident to transfer of note. See MORTGAGES, 5.

BODY CORPORATE. See MUNICIPAL CORPORATIONS, 1.

BONDS. See CORPORATIONS, 3–5. COSTS, 1. MUNICIPAL CORPORATIONS, 16. PRINCIPAL AND SURETY.

BOUNDARIES.

See RAILROADS, 7.

Ascertainment: Long established physical evidence.

1. When marks established by the original government survey cannot be found, the location of long-established and recognized physical evidence of boundary lines, as indicated by the maintenance of boundary-fences, becomes of value and importance, and cannot be disregarded or set aside either by a surveyor or by a court in determining the true government line. *Wilson v. Stork,* 561

Same: Agreement to accept boundary established by surveyor.

2. Under the evidence in this case, an oral agreement by adjoining landowners to abide by a survey made by a surveyor selected by them necessarily carried with it the implied understanding that the boundary line must be the correct one and be established with something approximating absolute certainty, and should not be construed as an agreement to abide by a line whether right or wrong. *Wilson v. Stork,* 561

BREACH of contract. See CONTRACTS.

BREACH OF MARRIAGE PROMISE.

Damages: Elements: Mental suffering: Medical expenses.

1. In an action for breach of a promise of marriage, where the complaint alleged seduction in aggravation of damages, compensation may be allowed by the jury for mental suffering, injury to reputation, and loss of virtue, but not for damage occasioned by the seduction, independent of the promise, such as medical expenses and loss of time. *Gauerke v. Kiley,* 543

Same: Evidence as to wealth of defendant: Punitory damages.

2. Evidence of the wealth of the defendant at the time of trial is admissible on the question of punitory damages and also on the issue of compensatory damages, as the best evidence of the prospects, at the time of breach, of which plaintiff was deprived by defendant's wrongful act. *Gauerke v. Kiley,* 543

Evidence: Birth of child: Attempt by defendant to cause abortion.

3. Evidence of pregnancy and birth of a child resulting from seduction is admissible to show publicity and extent of injury to reputation. *Gauerke v. Kiley,* 543

4. Evidence of an attempt by defendant to cause abortion, and that plaintiff was alone when the child was born, is inadmissible as having no legitimate bearing on any of the elements which may be considered in aggravation of damages. *Ibid.*

5. Testimony by plaintiff that defendant attempted to cause an abortion cannot corroborate her testimony as to the seduction. *Ibid.*

6. The admission of evidence of plaintiff that she was alone at the time of child-birth and that at the time of trial the child was dead, was prejudicial as calculated to excite sympathy for plaintiff and prejudice against defendant. *Ibid.*

BRIDGES.

See MANDAMUS, 1.

Injury to bridge by automobile: Sufficiency of highway: Negligence. See EVIDENCE, 4.

1. In order that a city may recover for damages to one of its bridges by being run into by defendant's automobile truck, it must appear not only that the driver of the truck was negligent, but that no defect in the highway contributed to produce the collision; and where the jury found against the city on both issues, any error as to the trial of one of them will not affect a judgment for the defendant, if the other was tried without error. *Baraboo v. Excelsior C. Co.* 242

Same: Defective approach: Improper repairs: Notice to city.

2. Where the approaches to a bridge had been repaired by a city under the supervision of its engineer and street commissioner, and the defect in the approach grew out of the manner in which such repairs were made, it was unnecessary to show any other facts to charge the city officers with actual or constructive knowledge of the defect. *Baraboo v. Excelsior C. Co.* 242

BROKERS.

See MORTGAGES, 5. NEW TRIAL, 2.

Creation of agency: Broker having no legal interest in land.

1. A real-estate dealer having no binding agreement with an owner of land sufficient to give him a legal interest therein was necessarily the agent of the owner in negotiating its sale. *Estes v. Crosby,* 73

Subagents: Authority.

2. Where a real-estate agent placed land for sale with another agent, the latter was his subagent, but as to third persons he was also agent for the owner. *Estes v. Crosby,* 73

Same: Scope of employment: Representations as to price.

3. Where an agent fixed the selling price of land and gave it to a subagent to be given to possible purchasers, it was within the scope of the subagent's employment to represent that

this was the lowest price the owner would accept. *Estes v. Crosby,* 73

Same: Misrepresentation as to price: Liability of agent.

4. A real-estate agent who, in placing land for sale with a subagent, fixed the selling price, and, knowing that the subagent represented to purchasers that this was the lowest price the owner would accept, received the benefit of such representation, was chargeable with the damage to the purchasers from their reliance thereon. *Estes v. Crosby,* 73

5. Where the price so fixed by the principal agent was higher than that asked by the owner, the fact that the subagent in good faith represented to purchasers that it was the lowest the owner would accept does not relieve the principal agent from the effect of such representations. *Ibid.*

Same: Liability of subagent: Good faith.

6. Where a subagent had reasonable grounds to understand that the price given him by the principal agent was the owner's price, and concealed no material fact within his knowledge from the purchasers, he incurred no liability by reason of his representation that this was the owner's lowest price. *Estes v. Crosby,* 73

BY-LAWS of fraternal order. See INSURANCE, 2, 3.

CANCELLATION OF INSTRUMENTS. See LIMITATION OF ACTIONS, 2.

CAPITAL STOCK. See CORPORATIONS, 1, 2.

CASHIER. See REFORMATION OF INSTRUMENTS, 2.

CHANGE OF VENUE. See CRIMINAL LAW, 19.

CHARTER. See CONSTITUTIONAL LAW, 8.

CHATTEL MORTGAGES.

Election of remedies: Action to recover property: Effect.

An effort to recover from a trustee in bankruptcy certain brick for which plaintiff held a bill of sale, in effect a chattel mortgage, executed by the bankrupt, was not an election inconsistent with his right to sue defendant for converting other brick, also covered by the mortgage, prior to the bankruptcy proceedings. *Ullman v. Austin,* 29

CHILDREN. See AUTOMOBILES, 1, 3. INFANTS.

CIRCUIT COURT. See WORKMEN'S COMPENSATION, 7–11.

CITIES. See MUNICIPAL CORPORATIONS.

CITY CHARTERS. See MUNICIPAL CORPORATIONS, 2.

CITY ORDINANCES. See MUNICIPAL CORPORATIONS.

CLAIM FOR COMPENSATION. See WORKMEN'S COMPENSATION, 1.

CLAIMS AGAINST DECEDENTS. See APPEAL, 12, 23. EVIDENCE, 13.

CLASS LEGISLATION. See CONSTITUTIONAL LAW, 5.

CLERK OF CIRCUIT COURT. See APPEAL, 7.

CLOSED SHOP. See INJUNCTION.

CODICIL. See WILLS, 1.

COHABITATION. See MARRIAGE, 8.

COMBINATIONS. See CONSPIRACY.

COMMERCIAL PAPER. See BILLS AND NOTES.

COMMISSIONER OF BANKING. See BANKS, 1, 3, 4. LANDLORD AND TENANT, 1.

COMMISSIONER OF PUBLIC WORKS. See MUNICIPAL CORPORATIONS, 10, 17, 18.

COMPETITIVE BIDDING. See MUNICIPAL CORPORATIONS, 11.

COMPLAINT. See CHATTEL MORTGAGES. MARRIAGE, 3, 8. PLEADING, 3.

COMPROMISE AND SETTLEMENT.

Undue influence: Misrepresentation of material fact.

1. Though a quitclaim deed by which an intervening defendant transferred a $12,000 interest in his father's estate to the plaintiff, his brother, for $400 may have been procured by fraud and undue influence, a settlement between the brothers before the commencement of litigation to determine the validity of the deed, pursuant to which settlement plaintiff paid intervener $5,600 in addition to such $400, was binding, and not the result of undue influence and misrepresentation of a material fact. *Bishop v. Bishop,* 172

Same: Settlement made in absence of attorney.

2. Such a settlement was not void because made in the absence of the attorneys of the brother who gave the deed and finally agreed to take $6,000 for a $12,000 interest in the estate which was conveyed by the deed. *Bishop v. Bishop,* 172

CONDITIONAL SALES. See GUARANTY. SALES, 4.

CONFESSION of judgment. See BILLS AND NOTES, 1.

CONFESSIONS. See CRIMINAL LAW, 5–7, 12.

CONFISCATION. See CONSTITUTIONAL LAW, 4. GAME.

CONFLICT OF LAWS. See MARRIAGE, 4, 5. STATES.

CONSIDERATION. See ACCOUNT. CONTRACTS, 1. CORPORATIONS, 4. ESTOPPEL. EVIDENCE, 9. MORTGAGES, 3.

CONSPIRACY.

Conspiracy to defraud: Exchange of property: Degree of proof required: Verdict.

1. In an action to recover damages resulting from a conspiracy to defraud, the evidence is *held* sufficient to support the jury's special verdict that two or more of the defendants had conspired to defraud plaintiffs through the exchange of real property. *Lange v. Heckel,* 59

2. To support an affirmative answer to the question whether defendants conspired to defraud, plaintiffs must establish the truth thereof by clear and satisfactory evidence to a reasonable certainty. *Ibid.*

3. It was not necessary that the jury in rendering a verdict against defendants should state whether they found them guilty of

fraud in inducing the intoxication of plaintiffs, or for other reasons, where the conspiracy for which they were convicted was one to defraud. *Ibid.*

Evidence: Direct or circumstantial.

4. Proof of conspiracy almost *ex necessitate* must rest upon circumstantial evidence, direct proof of the illegal combination being generally locked within the breasts of the conspirators, so that the ultimate fact of the corrupt agreement must be inferred from established facts and circumstances. An express agreement between the defendants to defraud plaintiffs is not necessary, a tacit understanding to defraud being sufficient. *Lange v. Heckel,* 59

CONSTITUTIONAL LAW.

See EMINENT DOMAIN.

Police power. See HEALTH. RAILROADS, 3.

Powers of state and federal governments. See STATES.

Amendments to federal constitution.

1. The first ten amendments to the United States constitution do not apply to the state governments, but only to the federal government itself. *Kentucky F. Corp. v. Paramount A. E. Corp.* 586

Right of employer to choose employees.

2. The right of an employer to exercise his constitutional privilege as to whom he will employ is established in this state. *A. J. Monday Co. v. Automobile, A. & V. Workers,* 532

Due process: Equal protection of laws: Adverse examination.

3. Sub. 7, sec. 4096, Stats., permitting the adverse examination of an officer of a foreign corporation bringing an action in this state, and sub. 2, sec. 4097, permitting the dismissal of the action for refusal to be examined and to produce papers, do not violate the due process and equal protection of the law clauses of the Fourteenth amendment to the United States constitution. *Kentucky F. Corp. v. Paramount A. E. Corp.* 586

Same: Confiscation of property illegally used.

4. Sub. (7), sec. 29.05, Stats., providing for the seizure and confiscation of property proved to have been used in violation of ch. 29, Stats., relative to game, though it makes no provision for notice and a hearing, does not deny due process of law, in violation of sec. 1, amend. XIV, Const. U. S., because secs. 3294–3296 and 3312 authorize actions to recover forfeitures and to recover property forfeited, and also in view of the owner's right to resort to replevin. *Gemert v. Pooler,* 271

Class legislation: County civil service law: Exemptions.

5. The county civil service law (secs. 16.31 to 16.44, Stats. 1919) is not discriminatory as in violation of sec. 1, art. I, Const. Wis., and amendm. XIV, Const. U. S., in that it exempts

from examination for county positions and offices persons who had been on the payroll of a county continuously for four years immediately preceding the date upon which it took effect, and exempting persons being in the service and on the payroll less than four years, and requiring them to take only a noncompetitive examination. *State ex rel. Milwaukee County v. Buech,* 474

Uniform system of town and county government: Civil service: Deputy sheriffs. See MUNICIPAL CORPORATIONS, 2. SHERIFFS, 3, 4.

6. Ch. 259, Laws 1917, providing for the appointment of certain officers under the civil service in certain counties, does not violate sec. 23, art. IV, Const., providing that the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable, because deputy sheriffs are to be appointed from a list furnished by the civil service commission without reference to their places of residence—a variation from sec. 59.21, Stats. 1919. *State ex rel. Milwaukee County v. Buech,* 474

7. The county civil service law (secs. 16.31 to 16.44, Stats. 1919) does not constitute a departure from uniformity in the system of county government, in violation of sec. 23, art. IV, Const., by reason of sec. 59.22, Stats. 1919, changing the liability of the sheriff for acts of his deputies in counties having a population of 200,000 or more, the latter section being enacted at a subsequent session of the legislature and constituting no inducement to the passage of the civil service law. *Ibid.*

Special legislation amending city charter: Annexation of territory.

8. Ch. 516, Laws 1919, providing for annexation of a portion of the town of Richmond to the city of Shawano, a city of the fourth class existing under the general charter law, is violative of sub. 9, sec. 31, art. IV, Const., prohibiting special legislation amending the charter of a city, such city functioning under a "charter" within such constitutional provision, and a change in the territory thereof being an amendment of its charter. *State ex rel. Shawano v. Engel,* 299

9. Sec. 32, art. IV, Const. (providing for general laws for the transaction of business prohibited by sub. 9, sec. 31, art. IV), and art. XI, Const. (relating to municipal corporations), do not sustain the enactment of ch. 516, Laws 1919, in view of ch. 183, Laws 1917, and the plain prohibitory provisions of sec. 31, art. IV, Const. *Ibid.*

Double jeopardy. See CRIMINAL LAW, 18.

Writ of error. See CRIMINAL LAW, 16.

Eligibility of sheriff for re-election. See SHERIFFS, 1, 2.

CONSTRUCTION OF CONTRACTS. See CONTRACTS.

CONSTRUCTIVE NOTICE. See SALES, 4.

CONTINGENT FEE. See ATTORNEY AND CLIENT, 1.

CONTINGENT REMAINDERS. See TAXATION, 8.

CONTINUANCE.

See APPEAL, 15.

Absence of necessary witness: Discretion of court.

1. An application for a continuance of an action because of the absence of a material witness is addressed to the sound discretion of the trial court. *Will of Bilty,* 20
2. Where an action had been pending for two years in the circuit court, an application for a continuance which did not indicate when an absent witness would return from France or when his testimony could be procured was properly denied, in the absence of a persuasive showing that justice would miscarry unless the continuance should be granted. *Ibid.*

Same: Lack of diligence: Testimony of witness available.

3. Where a case was on the calendar for two terms before an absent witness had entered the military service, and where no effort was made to take his deposition during such time or during the time he was in camp in this country, though he was one of the attorneys and had testified in the county court, an application for a continuance because of his absence in military service in France was properly denied for lack of diligence in procuring his testimony. *Will of Bilty,* 20
4. The continuance of a will contest case in the circuit court because of the absence of a witness was properly refused, where such witness had testified fully in the county court, such testimony being admissible in evidence upon the trial in the circuit court under sec. 4141*a*, Stats. *Ibid.*

CONTRACTS.

See ATTORNEY AND CLIENT. AUCTIONS AND AUCTIONEERS. CONVERSION. FRAUDS, STATUTE OF. PARTNERSHIP, 1. PHYSICIANS AND SURGEONS, 1. SPECIFIC PERFORMANCE.

Formation. See APPEAL, 22.

Requisites: Consideration: Mutuality.

1. Where there is no consideration for a contract except the mutual promises of parties, the contract is not binding on one party unless it is also binding on the other. *Pope v. Thompson,* 468

Same: Sunday contracts. See SUNDAY.

Validity. See CONSPIRACY, 4. CONSTITUTIONAL LAW, 2. INSURANCE, 2. MANDAMUS, 1. MARRIAGE. MUNICIPAL CORPORATIONS, 7, 8, 10–13. SUNDAY. VENDOR AND PURCHASER, 2.

Construction. See ASSIGNMENTS. BOUNDARIES, 2. EVIDENCE, 9. LANDLORD AND TENANT, 3. MASTER AND SERVANT, 1. PHYSICIANS AND SURGEONS, 1. SALES.

Same: Parties. See MUNICIPAL CORPORATIONS, 15.

2. The evidence in this case is *held* to sustain a finding of the court that a certain carload of potatoes was sold to B. individually and not to him and a corporation. *Schuck v. Blodgett,* 622

Substitution of parties. See MUNICIPAL CORPORATIONS, 15.

Duration: Contract to furnish steam: Definiteness: Termination. See MASTER AND SERVANT, 1. SPECIFIC PERFORMANCE, 1.

3. In a contract whereby defendant agreed to furnish steam for plaintiff's laundry, a clause that the steam was to be furnished to plaintiff while in the building occupied by it expressed duration of the contract, not a condition of performance of obligations agreed upon; the word "while" expressing the idea of duration when read in connection with the clause immediately following it. *American S. L. Co. v. Riverside P. Co.* 644

4. Such agreement is not void for indefiniteness as to time, though the time for continuance of the contract is not definitely specified, and hence the contract is not terminable at the will of either party. *Ibid.*

5. Such agreement obligated plaintiff to pay for the steam at the specified rate so long as it occupied the building, so that defendant could not avoid liability thereon for want of mutuality. *Ibid.*

Particular forms of contracts.
Arbitration. See BOUNDARIES, 2.
Insurance. See INSURANCE.
Sale. See SALES.
Municipal. See MUNICIPAL CORPORATIONS, 7–13.
Land. See VENDOR AND PURCHASER.

Modification of contract. See INSURANCE, 3.

Reformation of contract. See REFORMATION OF INSTRUMENTS.

Interest. See WILLS, 12.

CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES. FEDERAL EMPLOYERS' LIABILITY ACT, 4. HIGHWAYS, 3. NEGLIGENCE. RAILROADS, 11–13. STREET RAILWAYS, 3–6. TRIAL, 2, 3.

CONVERSION.

See CHATTEL MORTGAGES. TAXATION, 9.

Conversion of realty into personalty by trust agreement.

The conversion of realty into personalty may be effected by an agreement, as a trust agreement, as well as by will or otherwise; and there need be no specific direction to sell the land to convert it into personalty, but the direction may arise by necessary implication from the nature of the instrument. *Estate of Stephenson,* 452

CORPORATE LIMITS. See MUNICIPAL CORPORATIONS, 3.

CORPORATIONS.

See BANKS. RAILROADS. STATES.

Capital stock: Issue at less than par: Fraud. See ACCOUNT.

1. The issue of stock at less than par value, or with an understanding that it is not to be paid for, is contrary to sec. 1753,

Stats., and, when such facts appear, the issue is fraudulent in law irrespective of the intent. *Whitewater T. & P. B. M. Co. v. Johnson,* 82

Same: Liability of promoter: Measure of damages.

2. The measure of damages in an action against a promoter of a corporation for the issuance of stock to himself at less than par value is the difference between what he paid for the stock and the par value thereof, plus interest thereon from the date when the stock was issued to him. *Whitewater T. & P. B. M. Co. v. Johnson,* 82

Foreclosure of trust deed of corporation: Parties.

3. In an action by a bondholder to foreclose a trust deed given by a defendant corporation to secure payment of its bonds, other holders of the bonds secured by the same trust deed were properly made parties to the action. *Wegner v. Sheboygan-Elkhart Lake R. & E. Co.* 325

Same: Transfer of corporate property: Assumption of indebtedness: Sale of property.

4. The evidence in this case is *held* not to show that a corporation to which the defendant corporation transferred its property assumed, in consideration of such transfer, the payment of all defendant's debts, including the obligation evidenced by such bonds. *Wegner v. Sheboygan-Elkhart Lake R. & E. Co.* 325

5. Where the corporation mortgagor had transferred the mortgaged property to another corporation, the court properly directed that the property be sold unless the defendants pay into court the ascertained value thereof, and that the proceeds of the sale, or the money deposited in lieu of such sale, after the payment of costs and expenses, be paid to the bondholders to apply on their respective judgments against the debtor corporation in the proportion that the bonds owned by each bears to the total amount of bonds outstanding. *Ibid.*

Officers: Mismanagement: Liquidation of corporation: Dissolution. See ACCOUNT.

6. Where a corporation has been plundered by its officers or so mismanaged as to bring it to the verge of bankruptcy, threatening minority stockholders with the loss of their investment, and it seems certain that the purposes for which the corporation was organized are no longer attainable, and there is no other adequate remedy, a court of equity, in the exercise of its inherent power, will appoint a receiver, wind up the affairs of the corporation, distribute its assets, and decree a dissolution at the suit of a minority stockholder. *Goodwin v. von Cotzhausen,* 351

7. In an action for the appointment of a receiver for a lithographing company brought by minority stockholders on the ground of mismanagement by its president and general manager, the evidence is *held* to support a finding that the corporation could no longer be operated under the domination of such

president except to its own ruin and the loss to the stockholders of their entire investment, and that a sale of the assets and the winding up of its affairs should be had. *Ibid.*

Same: Loss of profits through mismanagement: Liability of officers.

8. A corporate officer may be held liable for profits lost by his mismanagement, and past profits of an established business constitute a legitimate basis on which to estimate future profits of the same business, properly managed, which were not realized because of defendant's mismanagement. *Goodwin v. von Cotzhausen,* 351

Same: Damages: Finding of referee: Weight.

9. Where a referee recommended the allowance of a certain amount of general damages based upon past profits of a business as an established one, it was error for the court to reduce the amount so recommended, where there was ample evidence to sustain the referee's finding and no clear preponderance against it. *Goodwin v. von Cotzhausen,* 351

Stockholder's action: Costs and attorneys' fees.

10. Where in a minority stockholder's action for a receivership and dissolution of a corporation other minority stockholders are joined as plaintiffs by order of the court, and such other plaintiffs have rendered valuable services in conserving and saving the fund for the benefit of all the stockholders, they are as much entitled to compensation out of the fund reserved for attorneys' services and expenses as the original plaintiff. *Goodwin v. von Cotzhausen,* 351

Foreign corporations: Examination of officers. See ADVERSE EXAMINATION, 1, 3.

CORRECTION of deeds. See MORTGAGES, 4.

COSTS.

See APPEAL, 30. CORPORATIONS, 10. JUDGMENT. WILLS, 6. WORKMEN'S COMPENSATION, 10.

Recovery: Bondholder required to bring action.

1. Where a bondholder was required to bring a foreclosure action because of the trustee's refusal to do so, he was entitled to recover his costs and disbursements, notwithstanding his claims that other bondholders had no right to recover in such action and that certain property was covered by the lien were denied. *Wegner v. Sheboygan-Elkhart Lake R. & E. Co.* 325

Same: Action to test sheriff's right to office.

2. Where at the time an action to test defendant's right to the office of sheriff was begun he was the *de jure* sheriff, and relator was not entitled to the office, defendant having been elected to fill the same notwithstanding his ineligibility, on appeal from a judgment dismissing the action neither party will be allowed costs other than that the defendant, who asserted the validity of his election, should be required to

pay the costs of the clerk of the appellate court, those in the court below to remain as there fixed. *State ex rel. Knutson v. Johnson,* 521

COUNTERCLAIM. See VENDOR AND PURCHASER, 5.

COUNTIES. See CONSTITUTIONAL LAW, 5–7. HIGHWAYS, 3. MANDAMUS, 4.

COUNTY CIVIL SERVICE. See CONSTITUTIONAL LAW, 5–7. SHERIFFS, 3–5.

COURTS.
Supreme court. See APPEAL.
Circuit courts. See DIVORCE, 1, 6–8. MARRIAGE, 1, 2. TRIAL.
County courts. See APPEAL, 16, 17. WILLS, 4.
Juvenile courts. See INFANTS.
Justices' courts. See JUSTICES OF THE PEACE.

COVENANTS.
In deed. See VENDOR AND PURCHASER, 5.
In lease. See LANDLORD AND TENANT, 1.

CRIMINAL LAW.

Juvenile offenders: Trial. See INFANTS.

Parties to crimes: Abettors. See HOMICIDE, 2.

1. Those present assisting one who personally commits a felony are aiders and abettors and are guilty as principals. *Krueger v. State,* 566

Same: Accessory before the fact. See INDICTMENT AND INFORMATION.

2. An accessory before the fact is one whose will contributes to a felony committed by another as principal while he himself is too far away to aid in the felonious act: one who was not present, actually or constructively, at the time a felony was committed, but who counseled, procured, or commanded another to commit it. *Krueger v. State,* 566

Evidence: Shoes worn by witness during shooting affray.

3. The admission in evidence of shoes worn by a witness who was shot a number of times during an affray, which shoes had bullet holes in them, is *held* not error as tending to prejudice the jury, in view of the testimony of the witness and a statement of the court in receiving the evidence that it was admitted only to show the direction from which the shots came. *Krueger v. State,* 566

Same: Statements of police officer: Hearsay.

4. Where the identification of an accused as the person seen leaving the place of the homicide was in issue, statements of police officers as to what a witness had said relative to the identity of the accused are hearsay and incompetent. *Hamilton v. State,* 203

Same: Proof of former conviction. See WITNESSES, 4.

Confessions: Sworn statements before district attorney: Repetition at preliminary hearing.

5. A sworn statement by defendant before the district attorney, after she had gone to his office with and at the request of the sheriff and at first had denied guilt, is not a voluntary confession and therefore is incompetent as evidence against her. *Flamme v. State,* 501

6. Defendant's repetition on preliminary examination of a confession is *held* not free of the duress that had attended it from the beginning; the facts and circumstances showing that she obviously acted on the belief that her written and sworn confession to the district attorney compelled her to repeat it before the police justice. *Ibid.*

Same: Admission of defendant as plea of guilty. See FOOD, 3, 4.

7. The admission of a defendant that cheese containing a larger percentage of moisture than that permitted by statute was sent from his factory into the channels of trade for sale or exchange amounted to a plea of guilty and rendered all errors complained of immaterial. *Scott v. State,* 487

Degree of proof required to convict: Review.

8. A conviction of a penal offense cannot be sustained unless the testimony as to the guilt of defendant meets the rigid test of satisfying beyond a reasonable doubt, mere suspicion of his guilt not being sufficient. *Bruno v. State,* 490

9. A person convicted of crime has a right to demand the solemn judgment of the supreme court as well as that of the trial court as to whether his guilt was sufficiently proved. *Hamilton v. State,* 203

Same: Evidence: Identity: Sufficiency of proof.

10. Where there is no direct evidence that defendant committed a crime, except the identification of him as the person seen leaving the place of the homicide, made by a fourteen-year-old boy who is not positive in his testimony, the fact that the defendant made false statements in reference to his residence, his movements on the night of the crime, and other details, and that a fellow prisoner in the jail in which he was held awaiting trial testified that he overheard the defendant admit the crime while at prayer, does not justify a conviction beyond all reasonable doubt. *Hamilton v. State,* 203

Trial: Separate trials of joint defendants: Discretion of court.

11. The question of granting or refusing separate trials to defendants jointly informed against for offenses arising out of the same transaction is largely within the discretion of the trial court. *Flamme v. State,* 501

12. The denial of separate trials is an abuse of discretion where the confession of one defendant, admissible against her but not against her codefendant, must inevitably operate to the prejudice of the rights of the codefendant. *Ibid.*

Same: Argument to jury: Stating facts not in evidence.

13. The statement of the district attorney of his knowledge of a fact, a matter not in evidence, is not permissible in argument, and on objection the jury should be cautioned not to consider it. *Flamme v. State,* 501

Same: Discharge for want of evidence: Effect.

14. The effect of discharging an accused person for want of sufficient evidence is in legal effect the same as a verdict of acquittal by a jury or a verdict of acquittal directed by the court. *State v. Meen,* 36

New trial: Newly discovered evidence: Review.

15. Where the evidence as to the identity of the person who committed a crime is unsatisfactory and it is alleged that there is newly discovered evidence on this issue which is important, and the supreme court under sec. 2405*m*, Stats., cannot say that all the evidence was before the jury and that upon the record justice has been done, a new trial will be ordered. *Hamilton v. State,* 203

Review: Writ of error by state.

16. A writ of error does not lie by the state in a criminal case except pursuant to constitutional statutory provisions. *State v. Meen,* 36

Same: Discharge of defendant for want of evidence.

17. The court may discharge a defendant for want of evidence, and such an order is final and not reviewable under sec. 4724*a*, Stats. *State v. Meen,* 36

18. The discharge of an accused person by the court, either before or after verdict, for want of sufficient evidence—in legal effect the same as an acquittal—is not reviewable by writ of error, on the application of the state, under sec. 8, art. I, Const., relating to putting twice in jeopardy. *Ibid.*

Same: Ruling on motion to change venue.

19. The disposition of a motion for change of venue on account of the prejudice of the people of the county necessarily rests largely in the discretion of the trial court, and its action is not to be reversed in the absence of abuse. *Krueger v. State,* 566

Same: Harmless error: Delay in striking out evidence.

20. Where it appeared that certain witnesses had no knowledge as to defendant's bad reputation except such as they had acquired from each other, but the circumstances were strongly corroborative of the defendant's guilt and it does not seem probable that another jury would reach a different conclusion, the failure to strike out the evidence and instruct the jury to disregard it until the close of the testimony, sixteen hours after its admission, was harmless. *Schwartz v. State,* 306

Specific offenses.

Arson. See ARSON.
Bastardy. See BASTARDY.
Embezzlement. See PRINCIPAL AND SURETY.

Specific offenses—con.
Homicide. See HOMICIDE.
Incest. See WITNESSES, 1.
Setting fires. See FIRES.
Violation of law of the road. See AUTOMOBILES, 3, 4.
Violation of pure food law. See FOOD.

CROSS-EXAMINATION. See WITNESSES, 1.

CRUEL AND INHUMAN TREATMENT. See DIVORCE, 2–5.

CUSTODY OF CHILD. See WORKMEN'S COMPENSATION, 6.

CUSTOM AND USAGE.

See EVIDENCE, 2. SALES, 3.

Furnishing abstract by vendor: Auction sales.
Evidence of the custom of a vendor of land to furnish an abstract is inadmissible where the defendant, by reason of the auctioneer's announcement at the sale, purchased on the condition that no abstract would be furnished. *Clarke v. Maisch,* 225

DAMAGES.

See DRAINS. FEDERAL EMPLOYERS' LIABILITY ACT. LIBEL AND SLANDER, 1. MASTER AND SERVANT, 1. RAILROADS, 9. VENDOR AND PURCHASER, 2, 6.

Definiteness: Loss of profits: Cause of loss.
1. Loss of profits, to be recoverable, must be capable of ascertainment with reasonable certainty, and plaintiff cannot recover therefor, in the absence of evidence that the loss was solely caused by the breach of a contract. *American S. L. Co. v. Riverside P. Co.* 644

Excessive damages: Loss of motion of forearm.
2. In an action for personal injuries sustained by plaintiff, a verdict for $3,000, though probably excessive for a simple fracture of the ulna followed by complete recovery, is not excessive where there was testimony which the jury had a right to believe that there were two fractures and that the motion of the forearm is permanently limited, having about sixty-five per cent. normal motion. *Leemans v. Hines,* 278

Same: Damage to well: Future injury. See NUISANCE, 1–3.
3. An award of $1,200 for infiltration of the soil and $100 for the pollution of plaintiff's well by industrial waste from a gas plant is not excessive. *Anstee v. Monroe L. & F. Co.* 291
4. The court having directed the abatement of the nuisance and its recurrence being unlikely, damages were properly assessed for future as well as present injury to the soil and well. *Ibid.*

Contributory negligence as affecting damages. See FEDERAL EMPLOYERS' LIABILITY ACT, 3.

Measure of damages. See BREACH OF MARRIAGE PROMISE, 1, 2. CORPORATIONS, 2, 8, 9.

DEATH.

See NEGLIGENCE, 4. WORKMEN'S COMPENSATION, 5.

Presumption of death: Time.

1. In a husband's action against a fraternal beneficiary society to recover a benefit payable on the death of his wife, the evidence for the husband is *held* insufficient to meet the burden resting upon him to establish the necessary fact that the death of a brother of the wife, one of the beneficiaries named in the certificate, occurred before her death. *Dobelin v. Ladies of the Maccabees,* 54
2. Unless the facts and circumstances shown are such as to warrant a reasonable inference that death took place at some particular time within the seven-year period limited by the presumption of death from absence, death is not presumed before the end of the period. *Ibid.*

DEBTOR AND CREDITOR. See ACCOUNT. APPEAL, 12. ASSIGNMENTS. ATTORNEY AND CLIENT. BANKS. BILLS AND NOTES, 1. CHATTEL MORTGAGES. CORPORATIONS, 5. ESTOPPEL. GARNISHMENT. GUARANTY. PRINCIPAL AND AGENT. PRINCIPAL AND SURETY.

DECEIT. See FRAUD. PRINCIPAL AND AGENT, 2, 4.

DEDICATION. See MUNICIPAL CORPORATIONS, 8.

DEDUCTIONS in income tax. See TAXATION, 2, 3.

DEEDS.

See ADVERSE POSSESSION. COMPROMISE AND SETTLEMENT. EVIDENCE, 6, 9. LIMITATION OF ACTIONS. MORTGAGES, 1–3. VENDOR AND PURCHASER, 5, 6.

Deed to take effect after death: Delivery: Intention to transfer title.

1. In an action to set aside a deed, the fact that the grantor, after signing the deed, handed it to a third person with instructions to keep it and not record it or deliver it to the grantee until after the grantor's death, is *held* not to show delivery of the deed with an intention of parting with title and control of the lands. *Padden v. Padden,* 212
2. Without an intention to transfer title, none passes by the mere execution of a deed and handing it to a third person to be held subject to the control of the grantor. *Ibid.*

DEFECTS IN HIGHWAY. See HIGHWAYS. TRIAL, 2.

DEFINITIONS. See WORDS AND PHRASES.

DEGREES OF CRIME. See HOMICIDE, 3.

DELINQUENT CHILDREN. See INFANTS.

DELIVERY. See DEEDS. GIFTS.

DEMURRER. See MARRIAGE, 3.

DEPENDENCY. See WORKMEN'S COMPENSATION, 6.

DEPOSITIONS. See ADVERSE EXAMINATION. CONTINUANCE, 3.

DEPUTY SHERIFFS. See CONSTITUTIONAL LAW, 5–7. MANDAMUS, 4. SHERIFFS, 3–5.

DESCRIPTION in deed. See EVIDENCE, 6. VENDOR AND PURCHASER, 6.

DEVISE. See WILLS, 7–12.

DIRECT EXAMINATION. See WITNESSES, 3.

DIRECTOR GENERAL OF RAILROADS. See APPEAL, 4. FEDERAL EMPLOYERS' LIABILITY ACT.

DISCOVERY. See ADVERSE EXAMINATION.

DISCRETION.
Of city council. See FOOD, 1. MUNICIPAL CORPORATIONS, 4.
Of court. See APPEAL, 16, 17. CONTINUANCE, 1. CRIMINAL LAW, 11, 12, 19. EVIDENCE, 4. JUDGMENT. NEW TRIAL, 2.
Of public works commissioner. See MUNICIPAL CORPORATIONS, 10.

DISMISSAL of proceedings. See INFANTS, 2.

DISSOLUTION of corporation. See CORPORATIONS, 6–10.

DISTRICT ATTORNEY. See CRIMINAL LAW, 5, 6.

DITCHES. See DRAINS.

DIVORCE.

See HUSBAND AND WIFE, 1. WORKMEN'S COMPENSATION, 6.

Powers of court.

1. Divorce actions and proceedings therein are entirely statutory, and whatever the statute does not give the court cannot assume, however broad its equity powers in other matters may be. *Towns v. Towns,* 32

Grounds of divorce: Cruel and inhuman treatment: Review.

2. On an appeal by the wife alone from a judgment refusing both parties a divorce because both were guilty of cruel and inhuman treatment, the finding of the trial court as to the cruelty of the wife only is reviewable. *Bird v. Bird,* 219

Same: Test: Effect on offended spouse.

3. In order to constitute cruel and inhuman treatment the conduct of the guilty party must be such as to cause mental suffering to the other and render impairment of health probable, so that the continuance of the marriage state would be dangerous. Whether certain conduct is cruel and inhuman depends on its effect on the offended spouse. *Bird v. Bird,* 219

Same: Evidence: Friendliness of wife to roomer: Unfriendliness to husband.

4. Evidence that the wife took automobile rides with a male roomer, played cards with him in his room, and upon one occasion wrote him an affectionate letter, is insufficient to show cruel and inhuman treatment of the husband by the wife, under the circumstances. *Bird v. Bird,* 219

5. Nagging of the husband by the wife and her refusal to take meals with him or accompany him to public places, where such conduct was the natural result of the husband's confessed immoral conduct with other women, is not sufficient to furnish the husband ground for divorce. *Ibid.*

Jurisdiction of court to review final judgment: Division of estate.

6. Except for the power given to the court to open a judgment within one year after notice thereof for mistake or surprise, as provided in sec. 2832, Stats., a judgment in a divorce action, so far as it makes a final division and distribution of property, cannot be reviewed or altered after the term of court in which it was rendered. *Towns v. Towns,* 32

Same: Revision of decree: Wife living in adultery.

7. The power given by sec. 2361 to the court in divorce actions to make, during the pendency thereof, orders concerning the support of the wife and the care and support of the minor children, and in relation to the parties or their property, does not warrant a court, after the term in which a final judgment was entered decreeing a final division of estate, in altering the decree as to the property awarded to the wife and relieving the husband from making payment of certain weekly instalments on the ground that the wife has become dissolute and is living in adultery with another man. *Towns v. Towns,* 32

8. The express authority granted to the court by sec. 2374 to affect the status of the parties to a divorce action by subsequent revision or modification of the judgment, is a controlling indication that the legislature did not intend that the provisions of the judgment relating to a final division of property might also be altered without a modification of the status of the parties. *Ibid.*

DOUBLE JEOPARDY. See CRIMINAL LAW, 18.

DRAFT EVADERS. See HOMICIDE.

DRAINS.

Obstructions in ditch: Action for damages.

The relief afforded by secs. 1384, 1386, Stats., for the removal of obstructions in a drainage ditch by an adjacent owner, being penal and not compensatory, was not intended to take the place of an action for damages; and since sec. 1382 requires such owner to maintain and keep in repair the portion of the ditch assigned to him, damages may be recovered from an adjacent owner for an obstruction without first invoking the statutory remedy. *Dargert v. Dietrich,* 584

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 3, 4.

DURATION OF CONTRACT. See CONTRACTS, 3.

DURESS. See CRIMINAL LAW, 5, 6.

EASEMENTS. See MUNICIPAL CORPORATIONS, 8.

ELECTION OF REMEDIES. See CHATTEL MORTGAGES.

EMINENT DOMAIN.

Separation of grade crossings.

A railroad company required to separate grade crossings under sub. 48, sec. 3, ch. IV, of the Milwaukee charter, must compensate the owner of the property taken in consummating the separation. *Application of Kaiser,* 40

EMPLOYEE. See MASTER AND SERVANT. WORKMEN'S COMPENSATION.

EMPLOYERS' LIABILITY. See FEDERAL EMPLOYERS' LIABILITY ACT. MASTER AND SERVANT. WORKMEN'S COMPENSATION.

EQUAL PROTECTION OF THE LAWS. See CONSTITUTIONAL LAW, 3.

EQUITY. See ACCOUNT. COMPROMISE AND SETTLEMENT. CONVERSION. CORPORATIONS, 6, 7. DIVORCE, 1. LIMITATION OF ACTIONS. MARRIAGE, 2. MORTGAGES, 4, 5. NUISANCE. PARTNERSHIP, 2. REFORMATION OF INSTRUMENTS. SPECIFIC PERFORMANCE.

ERROR. See APPEAL AND ERROR.

ESTOPPEL.

See INSURANCE, 3.

Acceptance of an assignment subject to designated deductions. See ASSIGNMENTS.

Where an assignee of a paving contractor, relying on an acceptance of the assignment by the property owner subject only to deductions for mechanics' liens, extended the time for payment of the contractor's debt to the assignee, its forbearance was sufficient, in such a situation, to estop the property owner from claiming other deductions. *Merchants & M. Bank v. Terrace Realty Co.* 109

EUGENIC MARRIAGE LAW. See MARRIAGE, 4.

EVIDENCE.

Judicial notice: Amount necessary to support boy. See ATTORNEY AND CLIENT, 2.

1. The court may take judicial notice that $10 a month will not support and educate a nine-year-old normal boy. *Ninneman v. Industrial Comm.* 190

Same: Milk as food. See FOOD, 2.

Presumptions: Custom and office routine: Sufficiency.

2. Proof that a letter addressed to defendant was dictated by plaintiff, coupled with proof of the custom in plaintiff's office with reference to mailing letters, is not sufficient to show mailing of a letter which defendant denied receiving, without some evidence to warrant an inference that the office customs were complied with in respect to the particular letter. *Federal Asbestos Co. v. Zimmermann,* 594

Presumption of death. See DEATH.

Admissions: Indorsement on certificate of deposit. See ADVERSE EXAMINATION, 2. CRIMINAL LAW, 5.

3. Where the defendant to whom testatrix had transferred certificates of deposit during her lifetime made a notation thereon, as a result of a conversation had with those who assisted in drawing and executing her will, that testatrix "wishes the interest on this paid to her as long as she lives. She then wishes me to sign it over to" specified church trustees, the notation was not an admission by testatrix or the trustees that there was not a present, completed gift. *Hudson v. Trustees, etc.* 238

Photographs: Fact to be proved: Discretion of court.

4. The reception in evidence of a photograph rests largely in the discretion of the trial court; and where it is made clear to the jury that a photograph was offered by the defendant for the purpose of showing the manner in which the city had repaired the approaches to a bridge and not to show the physical appearance of a highway at the time of an accident, the court did not abuse its discretion in receiving the photograph in evidence. *Baraboo v. Excelsior C. Co.* 242

5. Photographs may be offered in evidence for the purpose of identifying persons, places, and things and to exhibit particular locations or objects, where it is important that the jury should have a clear idea of the same and where the photographs will better show the situation than will the testimony of witnesses. *Ibid.*

Parol evidence: To contradict deed: Admissibility.

6. In the absence of allegations of fraud or mistake, oral evidence is inadmissible to contradict the provisions of a deed stating the description and amount of land conveyed. *Rowell v. Rhadans,* 86

7. A parol agreement that the holder of certain notes secured by a mortgage should have a prior right to the proceeds realized on a foreclosure sale could not be shown in a foreclosure proceeding, because it was evidence which would in effect vary and contradict the notes and mortgage. *Chafee Land Co. v. Sumption,* 408

8. Where a contract as written is free from ambiguity when applied to the subject matter of the transaction, parol evidence is not admissible to ascertain and explain its terms. *American S. L. Co. v. Riverside P. Co.* 644

Same: Consideration in deeds and mortgages.

9. Deeds and mortgages are not such bilateral contracts as foreclose the right of either party to show that the consideration and conditions for and of the contractual relationship between the parties is other than that, or even additional to that, expressed in the deeds or mortgages. *Clark v. Horicon State Bank,* 133

Same: Where uncertainty exists.

10. In an action on a note, where the defendant pleaded in abate-

ment that there had been an agreement to arbitrate the differences between the parties which had not been carried out, and the correspondence relating to the agreement did not specify the subject matter of the proposed arbitration, it was proper for the court to receive oral testimony of the surrounding circumstances. *Merchants & M. Bank v. Terrace Realty Co.* 109

Positive and negative testimony: Equal credibility of witnesses. See TRIAL, 5.

11. The positive testimony of a credible witness as to a particular matter is entitled to greater weight than the negative testimony of an equally credible witness as to the same matter; and an instruction as to positive testimony outweighing negative testimony which did not include the element of equal credibility of the witnesses, was error which requires reversal of the case. *Suick v. Krom,* 254

12. In an action for slander, the testimony of witnesses who testified positively that defendant did not speak the words charged did not constitute negative testimony. Negative testimony relates only to the testimony of a witness who had an opportunity to see an occurrence testified by some other witness to have taken place, that he did not see it, or of one who had an opportunity to hear or know of an occurrence testified positively by some other witness to have happened, that he did not hear it or recollect it. *Ibid.*

Weight and sufficiency. See APPEAL, 13, 14. ARSON. AUTOMOBILES, 5, 6. CONSPIRACY, 1, 2. CORPORATIONS, 4, 9. CRIMINAL LAW, 8, 10, 15. DEATH, 1. DIVORCE, 4, 5. FIRES. HOMICIDE, 2. INSURANCE, 1. MORTGAGES, 2. NEW TRIAL, 2. PARTNERSHIP, 1. PHYSICIANS AND SURGEONS, 1. PRINCIPAL AND AGENT, 4. STREET RAILWAYS, 3, 5. WILLS, 1, 4. WORKMEN'S COMPENSATION, 5, 7, 8.

Relevancy, materiality, and competency. See ADVERSE EXAMINATION. APPEAL, 21–25. BREACH OF MARRIAGE PROMISE, 2–6. CONTINUANCE, 4. CRIMINAL LAW, 3–6, 20. CUSTOM. WITNESSES.

Claims against estate: Value of services: Evidence. See APPEAL, 23.

13. In an action against a decedent's estate for services rendered decedent and his wife by their niece, the niece could testify to the value of her services though she testified also that she was not familiar with the value of such services in the neighborhood. *Nelson v. Ballestad,* 162

Former conviction: How proved. See WITNESSES, 4.

Hearsay. See CRIMINAL LAW, 4, 20.

Circumstantial evidence. See CONSPIRACY, 4.

Proof of reputation. See CRIMINAL LAW, 20.

EXAMINATION of adverse party. See ADVERSE EXAMINATION.

EXCEPTIONS. See APPEAL, 6.

EXCESSIVE DAMAGES. See DAMAGES, 2, 3.
EXCHANGE OF PROPERTY. See CONSPIRACY, 1.

EXECUTORS AND ADMINISTRATORS.

See APPEAL, 12. EVIDENCE, 13. GIFTS, 2. STATES. TAXATION, 4-9. WILLS.

Time of payment of legacies: Interest.

Where a will provided that if at the time of the death of testatrix a portion of the estate should be invested in such a way that it would be inexpedient to immediately settle the estate, the executors need not divide the same or pay any legacies for a period of three years, interest is not payable on the legacies until the expiration of the three-year period, it appearing that the testatrix made provision for maintenance during that period of those dependent on her bounty. *Will of Payne,* 608

FACTORS. See BROKERS.
FAILURE OF TITLE. See VENDOR AND PURCHASER, 5.
FALSE REPRESENTATIONS. See FRAUD.
FEDERAL CONSTITUTION. See CONSTITUTIONAL LAW. STATES.
FEDERAL CONTROL OF RAILROADS. See APPEAL, 4. RAILROADS, 1, 2.

FEDERAL EMPLOYERS' LIABILITY ACT.

See APPEAL, 5. NEGLIGENCE, 6.

Track used in interstate commerce: Employee injured while making repairs.

1. A railroad employee, injured while engaged in repairing a track which was an instrumentality in interstate commerce, had a right to recover under the federal employers' liability act (35 U. S. Stats. at Large, 65, ch. 149) rather than the state workmen's compensation act. *Kalashian v. Hines,* 429

What law governs.

2. In actions under the federal employers' liability act, questions of the injured employee's or defendant employer's negligence in connection with the injury are controlled by the principles declared by the federal rather than by the state courts. *Kalashian v. Hines,* 429

Negligence of employee: Effect on recovery.

3. Under the federal act, negligence of an injured employee proximately contributing to his injury merely diminishes proportionately the amount of his recovery for the negligence of his employer, also so contributing; and although the employee himself was negligent, negligence by the railroad also having been found, his negligence cannot be deemed the sole proximate cause of his injury. *Kalashian v. Hines,* 429

Assumption of risk: Negligence of co-employee.

4. Under the federal act there is no assumption of risk of the negligence of a fellow-servant by a co-employee until at least

actual knowledge of such particular negligence is brought to his attention, or it is so obvious that an ordinarily prudent person would observe it. *Kalashian v. Hines,* 429

Question for jury: Negligence.

5. In an action under the federal act by a railroad sectionman for loss of his legs when run over by a switch engine, questions of negligence on the part of the crew in charge of the engine are for the jury under conflicting evidence. *Kalashian v. Hines,* 429

FEDERAL RESERVE BOARD. See STATES.

FELLOW-SERVANT RULE. See FEDERAL EMPLOYERS' LIABILITY ACT, 4.

FIDUCIARIES. See STATES.

FINAL DIVISION OF ESTATE. See DIVORCE, 6–8. HUSBAND AND WIFE, 1.

FINDINGS OF FACT.
By court. See APPEAL. TRIAL.
By referee. See APPEAL, 20.
By industrial commission. See WORKMEN'S COMPENSATION.

FIRE INSURANCE. See INSURANCE.

FIRES.

Sufficiency of evidence.

The evidence in this case is *held* sufficient to sustain the conviction of the defendant on a charge of setting fire to and burning a quantity of lumber covered by insurance. *Richardson v. State,* 309

FOOD.

Regulation of sale of milk: Discretionary power of city council.

1. An ordinance of the city of Milwaukee requiring milk sold in the city, except certified milk and tested milk, to be pasteurized by either the "holding" or the "flash" system, is a regulation for the protection of the public health within the discretionary power of the common council. *Pfeffer v. Milwaukee,* 514

Milk as food: Pasteurizing.

2. Scientific knowledge concerning milk as a food and the best method of pasteurizing is so generally understood and known that courts will take judicial notice of these facts. *Pfeffer v. Milwaukee,* 514

Cheese with excess moisture content: Manufacture. See CRIMINAL LAW, 7.

3. Where cheese manufactured for sale or exchange was sent from defendant's factory into the channels of trade for sale or exchange containing a larger percentage of moisture than that permitted by sub. (9), sec. 4601—4*a*, and sec. 4601—7, Stats., defendant was guilty of a violation of the statute, though it was sent from the factory contrary to his order and

without his knowledge or consent, as the manufacturing process must be presumed completed, and no other intent than that of manufacturing for sale or exchange is required. *Scott v. State,* 487

4. As long as the process of manufacturing cheese is not completed and there is no intent to offer to sell or exchange it in its then condition, there is no violation of the statute, though the cheese contains more than forty per cent. of moisture. *Ibid.*

FORECLOSURE of mortgage. See CORPORATIONS, 3–5. COSTS, 1. EVIDENCE, 6, 7, 9. MORTGAGES.

FORFEITURES. See CONSTITUTIONAL LAW, 4. GAME. INSURANCE, 2, 3. MUNICIPAL CORPORATIONS, 9.

FRAUD. See ACCOUNT. BROKERS, 4–6. COMPROMISE AND SETTLEMENT, 1. CONSPIRACY. CORPORATIONS, 1, 2, 6–10. EVIDENCE, 6. LIMITATION OF ACTIONS. MARRIAGE, 6, 7. MORTGAGES, 3. PRINCIPAL AND AGENT, 2, 4. VENDOR AND PURCHASER, 2.

FRAUDS, STATUTE OF.

See VENDOR AND PURCHASER, 1.

Acceptance taking contract out of statute: Passive or negative conduct.

1. An acceptance which will take a contract of sale of goods of the value of more than $50 out of the statute of frauds (sec. 1684*t*—4, Stats. 1919), cannot result from passive or negative conduct; and failure of the purchaser to notify the seller, who has shipped the goods to him, that he will not take the same from the station or receive them, cannot raise an inference of acceptance. *Roberts, Johnson & Rand v. Mackowski,* 420

Services rendered pursuant to a void contract: Quantum meruit.

2. While a person rendering services for another which would otherwise be gratuitous may recover therefor on proof that they were rendered pursuant to an express promise or agreement to pay, though such promise or agreement was void under the statute of frauds, the recovery must be on *quantum meruit,* and the void contract may be invoked only for the purpose of rebutting such presumption and not for the purpose of measuring the recovery. *Estate of Salzwedel,* 441

GAME.

Forfeiture of personal property unlawfully used. See CONSTITUTIONAL LAW, 4. HUSBAND AND WIFE, 2.

It was not the legislative intent in sub. (7), sec. 29.05, Stats., in connection with other provisions of ch. 29, that personal property unlawfully used in violation of that chapter by one who is a trespasser or thief as to such property shall be subject to forfeiture as against the innocent owner. *Gemert v. Pooler,* 271

GARNISHMENT.

Defenses available to garnishee: Jurisdictional questions.

1. Under sec. 2765, Stats. 1919, authorizing the defendant to defend proceedings against a garnishee on the ground that the indebtedness is exempt, or for any other reason is not liable to garnishment, or upon any ground upon which a garnishee might defend the same, the defendant cannot interpose any defense which the garnishee could not interpose. *Schrader v. Gundeck,* 425
2. The defendant, like the garnishee, may defend against the garnishment in aid of execution on the ground that the court had no jurisdiction to render judgment in the principal action; but if such judgment was rendered by a court having competent jurisdiction so as to be a protection to the garnishee, mere irregularities are not available, nor can the issues in the principal action be relitigated. *Ibid.*

GENERAL CONTRACTORS. See MECHANICS' LIENS. MUNICIPAL CORPORATIONS, 14–19.

GENERAL DENIAL. See VENDOR AND PURCHASER, 6.

GIFTS.

See TAXATION, 6, 7.

Necessity of delivery.

1. In the absence of a delivery of property there is no gift, delivery being an essential element of a gift either *inter vivos* or *causa mortis. Estate of Salzwedel,* 441

Same: Intention to relinquish control. See EVIDENCE, 3.

2. In an action by the administrator with the will annexed of the donor of three certificates of deposit to recover possession thereof from a defendant who claimed to hold them as trustee for a religious corporation, the evidence is *held* to show that the transfer to defendant was with the intention of relinquishing control and dominion over them. *Hudson v. Trustees, etc.* 238

Same: Reservation of interest on certificates which are subject of gift.

3. There being an absolute present gift of certificates of deposit to trustees of church property by means of the delivery of the certificates indorsed and the surrender by the donor of possession to the donee, reservation of the interest accruing on the certificates during her lifetime did not destroy the effect of the transaction as a present gift. *Hudson v. Trustees, etc.* 238

GROSS NEGLIGENCE. See MASTER AND SERVANT, 2.

GUARANTY.

Guaranty of payment: Conditional sale: Owner retaking goods.

Where plaintiff entered into an agreement with a third person to sell conditionally a stock of merchandise for $3,200, to be

paid $100 in two weeks and the remainder in equal instalments of $200 each month, and defendant guaranteed payment of the first five instalments of $200 each, plaintiff could not recover from defendant, where, after payment of the first $200 instalment, the buyer abandoned the property and plaintiff rescinded the contract, took possession of the merchandise and sold it in regular course, and in every way treated the property as his own. *Wiedenbeck-Dobelin Co. v. Anderson,* 168 Wis. 212, distinguished. *Singer v. Millard,* 637

HEALTH.

Protection: Abatement of nuisances.

1. It is within the police power of the state, through the state board of health, to exercise the governmental function of protecting health by abating and removing nuisances. *State v. Laabs,* 557
2. It is within the legislative function, in the exercise of the police power of the state, to provide that a menace to the public health in the nature of a nuisance on lands must be removed, and such duty may be imposed upon the owner, the occupant, and the person creating and maintaining the nuisance; and in case of their failure, after notice, to remove it, they or any of them may be made liable to the state for the expenses incurred in removing it. *Ibid.*

HIGHWAYS.

See BRIDGES. EVIDENCE, 4. MUNICIPAL CORPORATIONS, 8. RAILROADS, 4–10. TRIAL, 2.

Defects outside of traveled track: Contributory negligence.

1. The act of traveling for one's own convenience outside of a way prepared for the public constitutes contributory negligence as a matter of law. *McChesney v. Dane County,* 234
2. Where a defect or obstruction within the limits of a highway is not in the traveled part of the road or so connected with it as to affect the safety and convenience of those using the traveled bed, the municipality is not responsible for an injury sustained by reason thereof. *Ibid.*

Same: Turning out to avoid collision.

3. In an action against a county for injuries sustained by an automobile driver by running into a culvert abutment in the road but not in the traveled part thereof, where the driver turned out of the traveled track to avoid an automobile approaching from the opposite direction, the question of whether the abutment was so connected with the highway as to affect the safety of the driver in his use of the traveled part of the highway is for the jury. *McChesney v. Dane County,* 234

Law of the road. See AUTOMOBILES.

HOMESTEAD. See SPECIFIC PERFORMANCE, 1.

HOMICIDE.

See CRIMINAL LAW.

Murder: Killing member of posse.

1. Where a deputy marshal, while attempting to serve warrants upon draft evaders, called for assistance by messengers to a village, one who responded, though not specifically called to the assistance of the marshal in person, had the status of an officer, and the killing of him by the draft evaders was murder. *Krueger v. State,* 566

Same: Evidence: Murder committed while resisting arrest.

2. In a prosecution of draft evaders for murder committed while resisting arrest, the circumstantial evidence is *held* sufficient to warrant a verdict of guilty as against one of them, although there was no direct evidence that he personally did any shooting or aided and abetted therein. *Krueger v. State,* 566

Trial: Failure to submit lower degrees to jury.

3. Failure of the trial court to submit the question of whether or not defendants were guilty of murder in the second degree or manslaughter in the third degree, is *held* proper in view of a showing that the shooting was deliberate. *Krueger v. State,* 566

Justifiable homicide: Officer serving warrant meeting with resistance.

4. Where a deputy United States marshal held warrants for the arrest of draft evaders, though their offense was only a misdemeanor under the federal statutes, when they resisted arrest with force of arms to the point of taking life the marshal had a right to overcome such resistance, and any taking of life necessary to do so constituted justifiable homicide under sec. 4366, Stats. *Krueger v. State,* 566

HUSBAND AND WIFE.

See DIVORCE. GAME. MARRIAGE. WITNESSES, 2.

Separate estate: Division of estate in divorce.

1. Money awarded to the wife as a final division of estate, although payable in instalments, is her separate property. *Towns v. Towns,* 32

Use of wife's property by husband: Trespass.

2. A husband using his wife's automobile without her knowledge or permission for the purpose of transporting game killed illegally, was a trespasser. *Gemert v. Pooler,* 271

IMPEACHMENT of witnesses. See WITNESSES, 2, 4.

IMPLIED AGENCY. See PRINCIPAL AND AGENT, 1.

IMPUTED NEGLIGENCE. See NEGLIGENCE, 9.

INCEST. See WITNESSES, 1.
INCOME TAX. See STATUTES. TAXATION, 1–3.

INDICTMENT AND INFORMATION.

Charge laid against principal: Conviction as accessory. See PRINCIPAL AND SURETY.

One who is charged simply as principal cannot be convicted as an accessory before the fact; but an erroneous instruction as to the guilt of an accessory before the fact is not prejudicial in the absence of evidence tending to show that either defendant was an accessory. *Krueger v. State,* 566

INDUSTRIAL COMMISSION. See WAR, 2. WORKMEN'S COMPENSATION.

INFANTS.

See WORKMEN'S COMPENSATION, 6.

Juvenile court: Powers: Rules of procedure.

1. The responsibility assumed by the juvenile court under the juvenile court act (secs. 573—1 to 573—10, Stats.) over a delinquent child is the same as that of a parent and necessarily carries great power, autocratic to the extent that it shall not be confined by the rules of procedure followed in criminal courts. *State v. Zirbel,* 498

Same: Dismissal of proceedings: Effect.

2. On the trial in the juvenile court of a fifteen-year-old boy charged with theft, the court was not warranted in committing him to the industrial school solely on proceedings had before another judge wherein such judge, after the probation officer to whom the boy had been assigned requested to be relieved of the charge, expressed his view that the boy should be committed to the industrial school, but upon objection of the parents to that course dismissed the proceedings and placed all responsibility for the boy upon the parents. Such dismissal, being in substance a final determination of all charges of delinquency, cannot be made the basis of a commitment in subsequent proceedings. *State v. Zirbel,* 498

Negligence of children. See NEGLIGENCE, 2, 5, 10, 11.

INHERITANCE TAX. See TAXATION, 4–9.

INJUNCTION.

See MUNICIPAL CORPORATIONS, 9. PLEADING, 3.

In labor disputes: Strike for closed shop.

Ch. 211, Laws 1919, providing that no restraining order or injunction shall issue in disputes "concerning terms or conditions of employment," is inapplicable to a strike purely and simply for a closed shop, there being no complaint as to the conditions under which employees were required to work or the wages paid. *A. J. Monday Co. v. Automobile, A. & V. Workers,* 532

INSPECTION OF DOCUMENTS. See ADVERSE EXAMINATION.

INSTRUCTIONS TO JURY. See APPEAL, 6, 27–29. AUTOMOBILES, 2. EVIDENCE, 11. INDICTMENT AND INFORMATION. LIBEL, 2. STREET RAILWAYS, 6. TRIAL, 5, 6.

INSURANCE.

See FIRES.

Rejection of application: Notice.

1. In an action to recover on an alleged contract of insurance for loss sustained by a fire, where it appeared that plaintiff's son had previously acted in the matter of obtaining insurance by carrying a message to plaintiff that the policy was about to expire, it is *held* that the local agent of the insurance company was justified in mailing to the son notice that the application in its present form would be rejected; and where the son failed to open the letter and the property was burned before the application was corrected, there can be no recovery. *Feldmeier v. Springfield F. & M. Ins. Co.* 377

Fraternal orders: By-laws: Forfeiture of contract.

2. A by-law of a fraternal order providing that upon the failure of a member to pay an assessment his benefit contract shall become void without notice, being a self-executing forfeiture provision, will be sustained. *Phillips v. Fraternal Reserve Asso.* 143

Same: Reinstatement: Modification of contract: Estoppel.

3. Where a member frequently became delinquent in paying monthly assessments, and each time, with a single exception, his default was relieved within the time and in the manner prescribed by the by-laws, such reinstatements as provided by the contract did not operate to modify it or to estop the association from asserting rights under a self-executing provision in the by-laws for forfeiture in event of delinquency, and, the member having died while delinquent, there can be no recovery on the ground of modification of the contract or of estoppel. *Phillips v. Fraternal Reserve Asso.* 143

INTENT. See CORPORATIONS, 1. DEEDS. EVIDENCE, 3. FOOD, 3, 4. GIFTS, 2, 3.

INTEREST. See CORPORATIONS, 2. EXECUTORS. WILLS, 11, 12.

INTERSTATE COMMERCE. See APPEAL, 5. FEDERAL EMPLOYERS' LIABILITY ACT.

INTERURBAN RAILWAYS. See STREET RAILWAYS, 1, 4.

JOINT AND SEVERAL COVENANTS. See VENDOR AND PURCHASER, 5.

JUDGMENT.

See APPEAL, 14, 30. MORTGAGES, 4. WORKMEN'S COMPENSATION, 11.

Opening default: Discretion of court.

It was not an abuse of discretion by the court to set aside a judgment entered upon default where the default was ade-

quately explained and defendant was entitled to a new trial; and the plaintiff, by accepting and retaining, without objection, the costs imposed by the order opening the case, waived his right of appeal. *Feldmeier v. Springfield F. & M. Ins. Co.* 337

Alteration and review. See DIVORCE, 6–8.

Collateral attack. See GARNISHMENT, 2.

JUDGMENT NOTE. See BILLS AND NOTES, 1.

JUDICIAL DISCRETION. See DISCRETION.

JUDICIAL NOTICE. See EVIDENCE, 1.

JURISDICTION. See ACCOUNT. BANKS, 1. GARNISHMENT, 2. MARRIAGE, 1, 2. WORKMEN'S COMPENSATION, 2–4.

JUSTICES OF THE PEACE.

Review of judgment by circuit court.

1. Where plaintiff, on appeal to the circuit court from a judgment of a justice of the peace, filed no affidavit for a trial *de novo* under sec. 3768, Stats., the circuit court was required to give judgment according to the weight of the evidence and the justice of the case, without regard to the finding of the justice and upon the return. *James v. Woerpel,* 164
2. Where it is evident from the decision of the trial court that he indulged in the presumption that there was evidence other than that appearing in the transcript, and that he felt bound to affirm the judgment because he was not convinced it was wrong, the appellant was not accorded the review to which he was entitled under sec. 3769, Stats., and the judgment of the circuit court is reversed. *Ibid.*

JUSTIFIABLE HOMICIDE. See HOMICIDE, 4.

LABOR DISPUTES. See INJUNCTION.

LACK OF DILIGENCE. See CONTINUANCE, 3.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Covenant against assignment: Transfers in liquidation proceedings. See BANKS, 3, 4.

1. The transfer of title from a trust company to the commissioner of banking by devolution in liquidation proceedings under sec. 2022, and any transfer that the commissioner might make of the lease of the bank premises in course of liquidation, did not constitute a breach of the covenant in the lease against assignment. *Liquidation of Citizens S. & T. Co.* 601

Covenant to pay for permanent improvements: Removing weeds.

2. An occupant of a farm who, pursuant to sec. 1480, Stats., spent some time in removing mustard weed cannot recover for such work in the absence of any agreement between him and the owner of the farm, the statutory duty to destroy the weed being as absolute upon an occupant of lands as upon the owner. *Tollefson v. Tollefson,* 149

Same: Changes for convenience: Sowing clover.

3. The construction of a small chicken house outside of a barn and certain changes in grain bins in the barn made by the occupant of a farm, being repairs or changes for his convenience, are not within an agreement whereby the owner was to pay for "permanent improvements" made by the tenant; neither is the sowing of clover, if primarily for fertilizing purposes, in the nature of a permanent improvement. *Tollefson v. Tollefson,* 149

LARCENY. See INFANTS, 2.

LEASE. See BANKS, 3, 4. LANDLORD AND TENANT.

LEGACIES. See APPEAL, 19. EXECUTORS. WILLS, 9–12.

LIBEL AND SLANDER.

Damages: Circulation of slander by plaintiff.

1. A storekeeper who, in the presence of others, accused plaintiff of being a thief is liable for injury to plaintiff's feelings and to her reputation caused by circulation of the charges among her friends and neighbors, not including the damages sustained by reason of plaintiff herself circulating the story. *Suick v. Krom,* 254
2. An instruction which would permit the jury, in determining plaintiff's damages, to consider the fact that the plaintiff herself told a number of her friends of the incident, is erroneous, as the defendant is not responsible for the circulation of the slander by the plaintiff. *Ibid.*

Defenses: Privilege in defending property.

3. A slander is not privileged on the ground that the defamatory words were spoken in defense of defendant's property, even though he was under the impression that plaintiff was in fact stealing his goods, as it was not necessary nor justifiable for him to publicly accuse plaintiff of stealing. *Suick v. Krom,* 254

LICENSEE. See NEGLIGENCE, 3.

LIENS. See MECHANICS' LIENS.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. WORKMEN'S COMPENSATION, 1, 2.

Accrual of action: Existence of cause of action not known.

1. Where sisters were induced by brothers to convey to them their interests in the realty of their deceased father for an amount less than the actual value of such interests, the sisters' cause of action for damages accrued at the time of such conveyance and was barred where not brought within six years thereafter, under sub. (3), sec. 4222, Stats., notwithstanding the sisters did not discover that they had not received full value for their interests until within six years before the commencement of the action, such action not being an equitable action for relief from fraud within sub. (7) of said section. *Darling v. Nelson,* 337

Lack of opportunity to plead statute of limitations.

2. Where the court denied cancellation of deeds and rendered judgment awarding money damages, the supreme court on appeal will reverse the judgment on the ground that the action was not brought within six years from its accrual, notwithstanding defendants did not plead the statute of limitations, plaintiffs not having asked for money damages and defendants therefore having had no opportunity to plead such statute. *Darling v. Nelson,* 337

LIQUIDATION. See CORPORATIONS, 6–10. LANDLORD AND TENANT, 1.

LOSS OF PROFITS. See CORPORATIONS, 8. DAMAGES, 1.

MALPRACTICE. See PHYSICIANS AND SURGEONS, 2–4.

MANDAMUS.

See MUNICIPAL CORPORATIONS, 8.

Nature and grounds: Necessity of refusal to perform legal duty.

1. Where a bridge company's refusal to repair a roadway was based on a void contract imposing such duty on the city, and it did not appear that the bridge company would refuse to keep the roadway in repair if not relieved of such duty by the contract, there was no such refusal to perform its legal obligations as entitled the city to compel performance by *mandamus. State ex rel. Superior v. Duluth & S. B. Co.* 283

2. *Mandamus* will not lie to compel the bridge company to pave and maintain the roadway in accordance with the city's demands, as the company might adopt a sufficient and appropriate manner of maintaining the roadway wholly different from that sought by the city. *Ibid.*

Same: Writ refused if ineffective.

3. A writ of *mandamus* to compel a school board to provide transportation for relator's children to and from school, under sec. 40.16, Stats., providing that where schools are suspended in a school district the school board shall provide transportation for children of a certain age living more than one mile from the nearest school, for a period of at least six months during the school year, was properly denied, where the final hearing in the proceedings was not concluded until the eleventh month of the school year and such writ could afford relator no relief. *State ex rel. Schertz v. Spiegel,* 260

Same: Form of action: Joinder of parties.

4. *Mandamus* is essentially a civil action so far as the rules and practice as to pleadings are concerned; and a county has such a joint or common interest with that of one seeking by *mandamus* to compel the sheriff to reinstate him in the service as a deputy and place his name on the payroll that it is properly joined as a relator, in view of sec. 2602, Stats., the object of which is to determine in one suit the rights of all parties in the subject matter of the litigation. *State ex rel. Milwaukee County v. Buech,* 474

MANSLAUGHTER. See HOMICIDE, 3.

MARRIAGE.

Annulment: Void or voidable marriage: Powers of court.

1. Under secs. 2351 *et seq.*, Stats. 1919, an action for the annulment of a marriage, jurisdiction of which is by sec. 2348 given the circuit court, is the proper remedy for setting aside either a void or a voidable marriage. *Lyannes v. Lyannes,* 381

2. Jurisdiction and power to annul a marriage, like that to divorce the parties, is exclusively of statutory creation, and cannot be extended under the general equitable powers of the court. *Ibid.*

Presumption of validity of marriage.

3. The presumption in favor of the validity of a marriage overrides the presumption of evidence that the laws of a sister state are the same as those of the forum, and in the absence of any allegation in the complaint to the contrary it will be deemed, on the consideration of a demurrer, that the parties to the marriage were not disabled or prohibited from marrying at the place where the ceremony was performed. *Lyannes v. Lyannes,* 381

Extraterritorial effect of marriage license law or eugenic marriage law.

4. Neither the marriage license law (secs. 2339*n*—1 to 2339*n*—27, Stats.) applicable to marriages solemnized in Wisconsin, nor sec. 2339*m*, providing for an ante-nuptial physical examination of those who are applicants for a license to marry within the state, has extraterritorial effect. *Lyannes v. Lyannes,* 381

5. Sec. 2330*m*, Stats., so far as it relates to marriage in another state of residents of this state, renders null and void such marriage only where the parties are disabled or prohibited, under the laws of this state, from marrying under any circumstances; that is, such a marriage as is prohibited by sec. 2330. *Ibid.*

Fraud: Nature warranting annulment.

6. Neither representation by the man that he is two years older than he is in fact, nor inducing a marriage in evasion of the state law, in another state, nor both, is or are of such substantial nature as to warrant annulment of a marriage for fraud. *Lyannes v. Lyannes,* 381

7. The marriage of plaintiff to defendant, induced by the representation of defendant that her pregnancy was due to intercourse with him, will be annulled when the pregnancy was in fact due to intercourse with another man. *Winner v. Winner,* 413

Cohabitation: Consummation of marriage.

8. An allegation of a complaint that plaintiff left defendant on the day after their marriage "and has never since cohabited

with him," in effect admits cohabitation prior to leaving and constitutes a consummation of the marriage within sub. (4), sec. 2351, Stats. *Lyannes v. Lyannes,* 381

MASTER AND SERVANT.

See CONSTITUTIONAL LAW, 2. FEDERAL EMPLOYERS' LIABILITY ACT. INJUNCTION. NEGLIGENCE, 6. PHYSICIANS AND SURGEONS; 1. WORKMEN'S COMPENSATION.

Wrongful discharge: Tender of resignation: Effect.

1. Where a salesman, before the expiration of his contract, requested by letter that his resignation be accepted, such tender of resignation was not a breach of contract; and the employer's reply that the salesman had breached his contract by writing the letter of resignation was a wrongful discharge justifying recovery of salary, commission, and expenses up to the time the resignation was to take effect. *Pringle v. Jackson Fence Co.* 634

Gross negligence of servant: Liability of master.

2. To render an employer liable for the gross negligence of a servant in the course of his employment, it is not essential that there should be a ratification of such negligence on the part of the employer. *Haswell v. Reuter,* 228

Failure to warn servant: Contributory negligence. See NEGLIGENCE, 3.

3. Where the defendants undertook to repair steam coils in the plant of a manufacturing company, and their employee in charge of the work called for one of the employees of the manufacturing company as a helper, and the helper was informed of his duties and the danger incident to the moving of the coils was obvious, it is *held* that the death of the helper by the tipping of one of the coils was not proximately caused by the failure of the defendants to warn and instruct him as to the dangers incident to the work. *Zurich Gen. Acc. & L. Ins. Co. v. Bowers,* 116

4. Where the employee of the defendants was engaged in moving the coil by the application of a pinchbar and the deceased was holding it steady, the fall of the coil does not, under the rule of *res ipsa loquitur,* establish that the operator of the pinchbar was negligent, as the fall of the coil may have been purely accidental or caused by the failure of the deceased to hold it in an upright position. *Ibid.*

MATERIALMEN. See MECHANICS' LIENS. MUNICIPAL CORPORATIONS, 17, 18.

MAXIMS.
Caveat emptor, 227.
Res ipsa loquitur, 117, 120.
Res judicata pro veritate accipitur, 428.

MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS.

See ASSIGNMENTS. ESTOPPEL. MUNICIPAL CORPORATIONS, 14–19.

Sewer as machinery.

A sewer is "machinery" within sec. 3328, Stats., giving a materialman a lien for material used in the construction, repair, or removal of any building or machinery. *Worden-Allen Co. v. Milwaukee,* 124

MILWAUKEE CITY CHARTER. See MUNICIPAL CORPORATIONS, 10, 12, 13. RAILROADS, 4–6.

MINORITY STOCKHOLDERS. See CORPORATIONS, 6.

MINORS. See INFANTS.

MISREPRESENTATIONS. See COMPROMISE AND SETTLEMENT, 1.

MISTAKE. See EVIDENCE, 6. REFORMATION OF INSTRUMENTS, 1, 3. VENDOR AND PURCHASER, 6. WORKMEN'S COMPENSATION, 4.

MODIFICATION of contract. See APPEAL, 22. INSURANCE, 3.

MORTGAGES.

See CHATTEL MORTGAGES. CORPORATIONS, 3–5. COSTS, 1. SPECIFIC PERFORMANCE.

Deed as mortgage: Evidence. See EVIDENCE, 6, 7, 9.

1. In an action to foreclose a mortgage given to a building and loan association, wherein it appeared that the mortgagor had executed a deed to the property containing a clause that the grantee assume the mortgage, and that the land passed by similar deeds to defendant, who claimed that the deed from his immediate grantor was in fact a mortgage, the fact that testimony of both grantor and grantee that such deed was prepared in a certain real-estate office was contradicted by conclusive evidence that it was prepared in the office of plaintiff did not so discredit their testimony as to make erroneous a finding that the deeds were mortgages. *Wis. S. L. & B. Asso. v. Boehme,* 1

Same: Assumption of mortgage: Effect: Judgment. See REFORMATION OF INSTRUMENTS, 2.

2. Land having passed by deeds wherein the grantee assumed a mortgage to one of the defendants, who contended that the deed from his immediate grantor was in fact a mortgage, the evidence is *held* to support a finding that the transaction was for the purpose of extending security to the defendant and that the deed executed to him was in fact a mortgage. *Wis. S. L. & B. Asso. v. Boehme,* 1

3. Where a deed is in fact a mortgage and executed for the purpose of extending security to the grantee, a clause wherein the grantee assumes a mortgage on the property conveyed is not supported by a consideration, and it is immaterial whether the clause was inserted through fraud, or mistake, or whether the grantee knew thereof. *Ibid.*

4. In an action to foreclose a mortgage the court may adjudge that warranty deeds given by the defendant's assignee to a codefendant were in fact mortgages and strike therefrom a clause whereby the grantee assumed payment of the mortgage. *Ibid.*

Transfer of note: Pro rata interest in security.

5. Where land was sold and a mortgage and notes were executed for the purchase price, part of the notes being given to brokers as commission for the sale under a verbal agreement that the note retained by the seller should have priority in the security given, transferees in due course and for value of the notes given the brokers were entitled to a *pro rata* interest in the proceeds realized on foreclosure, the security passing with the notes. *Chafee L. Co. v. Sumption,* 408

MOTIONS.

Oral testimony on hearing: Propriety.

Oral testimony taken upon the hearing of a motion does not become a part of the record upon the mere certificate of the court reporter. [Whether under any circumstances oral testimony is proper upon the hearing of an ordinary motion, *quære.*] *Will of Bilty,* 20

To dissolve injunction. See PLEADING, 3.

To strike answer. See PLEADING, 2.

MOTOR VEHICLES. See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

See AUTOMOBILES, 4. BRIDGES. EVIDENCE, 4. HIGHWAYS, 2, 3. MANDAMUS, 1, 2, 4. RAILROADS, 3–10.

Distinction between "towns and counties" and "cities and villages."

1. There is a substantial difference between *quasi*-municipal corporations, such as towns and counties (each of which is declared to be a body corporate by secs. 773 and 650, Stats., respectively), and municipal corporations proper, such as cities and villages; and decisions of this court in relation to changing the boundaries of towns and counties are not applicable to a city. *State ex rel. Shawano v. Engel,* 299

Cities of fourth class: Charter: Amendment.

2. A city of the fourth class under the general charter law (secs. 925—1 to 925—169, Stats.) exists and functions under a "charter," in the ordinary meaning of that term, and within the meaning of sec. 31, art. IV, Const., prohibiting the enactment of any special or private law incorporating any city, town, or village, or amending the charter thereof. *State ex rel. Shawano v. Engel,* 299

Same: Description of territory. See CONSTITUTIONAL LAW, 8, 9.

3. The description of the territory included within the corporate limits of a city of the fourth class existing under the general

charter law is a part of its charter. *State ex rel. Shawano v. Engel,* 299

Common council: Enactment of ordinance: Motive. See FOOD, 1.

4. The motive of a common council in enacting an ordinance is not a proper subject of judicial inquiry; it is enough that the council had the power under the city charter and acted in the manner prescribed by law. *State ex rel. Miller v. Baxter,* 193

Officers and agents: Powers of city: Assumption. See BRIDGES, 2.

5. Agents, officers, or even the city council of a municipal corporation cannot bind it by the assumption of powers not granted to it in express words or necessarily and fully implied in or incidental to the powers expressly granted, or essential and indispensable to its declared objects and purposes. *State ex rel. Superior v. Duluth & S. B. Co.* 283

Same: Power of mayor of Superior over police force.

6. The power of the mayor of the city of Superior, under its charter (Laws 1891, ch. 124, sec. 22), to designate the members of the police force to be discharged so as to conform to an ordinance reducing the force, is not affected by the police and fire commission law, the power conferred on the board of police and fire commissioners by sec. 959—40*m*, Stats., to organize and supervise the police department, being applicable only to cities of the third and fourth classes, and the power of the board, under sec. 959—45, to remove a policeman being for cause only. *State ex rel. Miller v. Baxter,* 193

Contracts: Form: Validity.

7. Contracts binding a municipality can be made only in the manner prescribed by its charter, and municipal officers must follow the prescribed procedure step by step. *Neacy v. Milwaukee,* 311

Same: Contract beyond power of city.

8. A contract by which a bridge company granted to the city of Superior an easement for a street over a strip of land leading from a public street to the approach of its bridge, and which obligated the city to maintain the roadway over the land, was beyond the powers conferred on the city and void, and gave the city no easement, where the strip was not dedicated as a street and the city did not lay out a street as provided in its charter. *State ex rel. Superior v. Duluth & S. B. Co.* 283

Same: Abandonment of project: Forfeiture.

9. In an action to enjoin the city of Milwaukee from expending corporate funds for the purchase of concrete posts for a municipal lighting plant, the evidence is *held* not to sustain the contention of plaintiff that the city had abandoned the erection of the lighting plant, or had forfeited its right to proceed with the project because its original plans may have been modified. *Neacy v. Milwaukee,* 151 Wis. 504, followed. *Neacy v. Milwaukee,* 311

Same: Commissioner of public works: Powers: Rejection of bids.

10. Where the commissioner of public works of the city of Milwaukee recommended rejection of the lowest bid and acceptance of the higher because of the incompetence of the lowest bidder, and, after the refusal of the common council to follow his recommendations, rejected all bids and drew up different specifications and let the contract to the sole bidder thereunder, the contract was void, the commissioner having no discretion, under sec. 10, ch. V, of the Milwaukee charter, to reject bids except where unreasonably high. *Neacy v. Milwaukee,* 311

Same: Contracts involving patented process: Validity.

11. Where a city charter required a contract for concrete posts to be let to the lowest bidder, a contract let to a manufacturer of concrete posts by patented process with the use of patented machines was void, since in such case material which did not constitute the subject of competitive bidding could not be used. *Neacy v. Milwaukee,* 311

12. Where such concrete posts, while not patented, could not be made except by machinery which was patented, sec. 23, ch. V, of the charter of the city of Milwaukee, providing for the acquirement of the right to the use of a patented article, must be complied with; this section of the charter being intended to exclude any other method of acquiring for the city the advantages of patented rights, articles, or processes. *Ibid.*

13. The city's contract for concrete posts, which could only be manufactured by a patented process with the use of patented machines, is void, since the only manner by which the city could obtain the advantages of such patent rights was by contract for use of the patented process and machines under the city charter (sec. 23, ch. V), relating to the city's use of "patented articles, process, combination or work," such charter provision having reference to every situation where, by reason of the existence of patent rights, there could be no competition in letting contracts. *Ibid.*

Mechanics' liens: Waiver: Liability of surety.

14. A subcontractor's action against a city and a principal contractor to determine the amount due on the contract and the subsequent application of moneys in the hands of the city under the mandate of the judgment in part payment of the indebtedness to the subcontractor, do not constitute a waiver and satisfaction of all rights under the contract, precluding the subcontractor from suing the contractor's surety. *Northwestern B. & I. Co. v. Maryland C. Co.* 526

Same: Principal contractor not released: Subcontractors.

15. Where a city refused to consent to the substitution of a third party as principal contractor, the third party's agreement with the principal contractor to complete the contract with the city was merely an agreement to furnish labor and ma-

terial still due from the contractor. *Northwestern B. & I. Co. v. Maryland C. Co.* 526

16. Where the principal contractor's bond was conditioned on his performance of his contract, which provided that he should furnish satisfactory evidence "that all claims of all persons who have been employed upon the work, or who have furnished materials for the work under his contract and according to these specifications, have been fully settled," the contractor's surety was liable to unpaid subcontractors and materialmen, the words "fully settled" meaning paid and discharged. *Ibid.*

Same: Lien of materialman: Commissioner of public works of Milwaukee.

17. A materialman furnishing steel necessary to carry out a contract with the city of Milwaukee for the construction of a sewer has no lien therefor under ch. 332, Laws 1878, providing that any person that shall furnish supplies or materials in the execution of any contract awarded by the board of public works or the commissioner of public works of the city shall have a lien therefor, where the contract under which the materials were furnished was not one awarded by the board of public works or by the commissioners but by the sewerage commission under sub. (i), sec. 5, ch. 608, Laws 1913, and sec. 8 of the same chapter. *Worden-Allen Co. v. Milwaukee,* 124

18. Where the contract was awarded by the sewerage commission, a right to a lien exists under sec. 3328, Stats., providing that any subcontractor who has done work or labor or furnished materials to any principal contractor for the construction of any building or machinery may maintain an action therefor, such section not being inconsistent with ch. 332, Laws 1878, creating a materialman's lien under contracts by the board or commissioner of public works, in which case the latter statute is controlling. *Ibid.*

Same: Material used in constructing sewer. See MECHANICS' LIENS.

19. In an action by a materialman against a city to recover for materials furnished, the fact that part of the materials was turned over by the principal contractor to another subcontractor to be installed did not deprive the materialman of his right to a lien where such material was actually used in the construction of the sewer. *Worden-Allen Co. v. Milwaukee,* 124

MURDER. See CRIMINAL LAW, 10, 15. HOMICIDE. WITNESSES, 4.

MUTUALITY. See CONTRACTS, 1, 4, 5.

MUTUAL BENEFIT SOCIETIES. See DEATH, 1.

MUTUAL MISTAKE. See MISTAKE.

NATIONAL BANKS. See STATES.

NEGLIGENCE.

See AUTOMOBILES. BRIDGES. CORPORATIONS, 8. FEDERAL EMPLOYERS' LIABILITY ACT. HIGHWAYS. MASTER AND SERVANT, 2–4. PHYSICIANS AND SURGEONS, 2–4. RAILROADS, 12. STREET RAILWAYS, 3–5. TRIAL, 2, 3, 7. WITNESSES, 3. WORKMEN'S COMPENSATION.

Presumption of exercise of ordinary care.

1. In the absence of all evidence, a person injured is presumed to have been in the exercise of ordinary care; but such presumption does not obtain where there is credible evidence to the contrary. *Pinz v. Milwaukee E. R. & L. Co.* 11

Acts constituting negligence: Leaving children unattended.

2. It was not negligence as a matter of law for a mother and father, while both were at work, to leave the plaintiff, who was nearly eight years old, in the care of his fourteen-year-old sister in their home on an ordinary residence street. [Whether the negligence of the parents would be a bar to the plaintiff's action, not decided.] *Kashuda v. Adams E. Co.* 25

Same: Visitor in mill: Trespassers and licensees.

3. An employee of a mason contractor doing work on an outside wall of the boiler room of a mill, who during the noon hour, for pleasure, wandered through the mill and was injured in using a so-called manlift or Humphrey elevator having no safety device, was a trespasser, and not a licensee, within sub. (5), sec. 2394—41, for whom as well as for employees sec. 2394—48 requires an employer to make the place of employment reasonably safe. *Klemens v. Morrow M. Co.* 614

Same: In use of highway. See AUTOMOBILES. BRIDGES. HIGHWAYS.

Same: Failing to read instruments. See REFORMATION OF INSTRUMENTS, 2.

Proximate cause: Defective machinery.

4. In an action for the death of an employee of one using an electric motor, the negligence of the defendant electric company in failing to properly repair and install the motor was not the proximate cause of death by electric shock, where, after the installing and attempted repair by defendant, an employee of decedent's employer attempted to make such repairs as would render the apparatus safe, both decedent and his employer having knowledge that defendant had not properly installed and repaired the motor. *Wilczynski v. Milwaukee E. R. & L. Co.* 508

Same: Leaving horse unhitched.

5. Where the plaintiff, nearly eight years old, climbed up on one of defendant's wagons and was injured when the horse became frightened and ran away, and there was evidence that the driver asked plaintiff to put an empty feed bag in the wagon and that the driver left the horse unhitched and went away, the court properly refused to set aside findings of the

jury that defendant was negligent and that such negligence was the proximate cause of the injury. *Kashuda v. Adams Exp. Co.* 25

Same: Question for jury.

6. The evidence in this case is *held* to show that plaintiff, who, after seeing a locomotive engine, paid no further attention to it while crossing a railroad track diagonally on his way to a handcar with a load, was negligent; and also to justify a finding that there was a want of ordinary care in the management of a switch engine by a switching crew at the time of plaintiff's injury which was the proximate cause of the accident. *Kalashian v. Hines,* 429
7. When causal connection is clear it may be found by the court, but when not clear it is a question for the jury. *Haswell v. Reuter,* 228

Contributory negligence: Proximate cause.

8. Any want of ordinary care, no matter how slight, on the part of the plaintiff, which proximately contributes to his injury, amounts to contributory negligence. *Baraboo v. Excelsior C. Co.* 242

Same: Imputed negligence.

9. The negligence of the driver of a private conveyance is imputed to a person voluntarily riding therein, and if such negligence contributes to an injury to such person it defeats an action against a third party based on the latter's negligence. *Puhr v. Chicago & N. W. R. Co.* 154

Same: Negligence of children: Question for jury.

10. Where danger is remote and not so obvious as to be easily appreciated, it is usually a question for the jury whether a child appreciated the danger to such an extent as to be responsible for its conduct. *Kashuda v. Adams Exp. Co.* 25
11. The act of a boy in climbing on a wagon at the driver's request is *held* not contributory negligence as a matter of law. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE. See CRIMINAL LAW, 15. NEW TRIAL, 1.

NEW TRIAL.

See APPEAL, 32. CRIMINAL LAW, 15. JUDGMENT. WITNESSES, 3.

Grounds: Newly discovered evidence. See CRIMINAL LAW, 15.

1. Excluded testimony and newly discovered testimony bearing on the testamentary capacity of a testatrix are *held* not such as to call for a different finding on the subject. *Will of Keenan,* 94

Same: Unsatisfactory evidence: Discretion of court.

2. In an action to recover compensation by a broker who was the procuring cause of an exchange of land for a stock of goods, under an agreement whereby the owner of the land was to receive a net price or value therefor, the court did not abuse

its discretion in granting a new trial after verdict for plaintiff, where the evidence as to the value of the stock exchanged for the land was unsatisfactory and was based upon superficial estimates made from three weeks to nine months from the time of the trade. *Rickert v. Prehn,* 423

NONNEGOTIABLE NOTE. See BILLS AND NOTES, 1, 2.

NONSUIT. See WORKMEN'S COMPENSATION, 2.

NOTICE.
Of adverse examination. See ADVERSE EXAMINATION, 3.
Of defect in highway. See BRIDGES, 2.
Of entry of judgment. See WORKMEN'S COMPENSATION, 11.
Of personal injury. See WORKMEN'S COMPENSATION, 1.

NOVATION. See MUNICIPAL CORPORATIONS, 15.

NOXIOUS WEEDS. See LANDLORD AND TENANT, 2.

NUISANCE.

See DAMAGES, 3, 4. HEALTH.

Pollution of well: Special damages.

1. An owner of land near a gas plant may bring an action for damages from infiltration of the soil and the pollution of his well and for an abatement of the nuisance, such damages being special to such owner, notwithstanding other property owners in the vicinity also sustained damages. *Anstee v. Monroe L. & F. Co.* 291
2. Where plaintiff's house was located about 1,200 feet from a gas plant and the smoke and the odor affected the comfort, if not the health, of his family, his damage was special and entitled him to maintain an action for damages and for abatement of the nuisance. *Ibid.*

Action of abatement: Different damages suffered.

3. It is not essential to the maintenance of an action for damages sustained from a nuisance and for abatement of the nuisance that plaintiff alone should be affected by the nuisance, it being sufficient if he belongs to a class specially affected by it, and whose damages differ, not only in degree but also in kind, from those of the public generally. *Anstee v. Monroe L. & F. Co.* 291

OFFICERS. See CONSTITUTIONAL LAW, 5–7. CORPORATIONS. HOMICIDE, 1. MUNICIPAL CORPORATIONS, 5, 6. SHERIFFS.

ORDINANCES. See MUNICIPAL CORPORATIONS, 4. RAILROADS, 6. STREET RAILWAYS, 1.

OVERHEAD CROSSINGS. See RAILROADS, 8.

PARENT AND CHILD. See AUTOMOBILES, 1, 3. EVIDENCE, 1. INFANTS. NEGLIGENCE, 2. PRINCIPAL AND AGENT, 1–4. WORKMEN'S COMPENSATION, 6.

PAROL EVIDENCE. See EVIDENCE, 6–10.

PARTIES. See CORPORATIONS, 3, 10. MANDAMUS, 4. VENDOR AND PURCHASER, 5. WAR, 2. WORKMEN'S COMPENSATION, 11.

PARTNERSHIP.

See TAXATION, 1, 3, 9.

Creation: Negotiations: Definiteness: Evidence.

1. Evidence showing negotiations for the joint undertaking of certain contracts, in which no definite terms of partnership were stated, is *held* not to warrant the jury in finding an agreement to form a partnership, for breach of which plaintiff was entitled to a share of the profits made by defendant on the resale of a contract let to him. *Pope v. Thompson,* 468

Actions between partners: Necessity of accounting.

2. One partner cannot maintain an action at law for a share of the profits against his copartner in the absence of a final accounting or settlement of the partnership affairs. *Pope v. Thompson,* 468

PAR VALUE. See CORPORATIONS, 1, 2.

PASTEURIZING MILK. See FOOD, 1, 2.

PATENTED PROCESSES. See MUNICIPAL CORPORATIONS, 11–13.

PATIENT. See PHYSICIANS AND SURGEONS.

PAYMENT. See SALES, 1–3.

PENALTY. See WILLS, 11.

PERSONAL INJURIES. See APPEAL, 4, 5. ATTORNEY AND CLIENT, 1. AUTOMOBILES. DAMAGES, 2. FEDERAL EMPLOYERS' LIABILITY ACT. HIGHWAYS, 3. MASTER AND SERVANT, 3, 4. NEGLIGENCE. RAILROADS, 11, 12. STREET RAILWAYS, 3–6. WORKMEN'S COMPENSATION.

PERSONAL PROPERTY. See AUCTIONS AND AUCTIONEERS. TITLE TO PERSONAL PROPERTY.

PHOTOGRAPHS. See EVIDENCE, 4, 5.

PHYSICIANS AND SURGEONS.

See WORKMEN'S COMPENSATION, 5.

Action for compensation: Surgeon under annual contract.

1. In an action by a surgeon, under an annual contract with a railroad company to treat its employees, to recover compensation for performing an operation on a railroad laborer, the evidence is *held* to establish an agreement that the laborer should pay personally for the operation, and not the railroad. *Harrington v. Legge,* 639

Malpractice: Issuable fact: Negligence.

2. In an action against a surgeon for malpractice, a finding by the jury that defendant did not use a method ordinarily used by surgeons of good standing in the vicinity does not decide any issuable fact. *Stenkowiczki v. Lytle,* 625

3. Testimony by several doctors that the method of treatment used to cure plaintiff's hernia was obsolete and improper, opposed by testimony of defendant's witnesses that the method used was a proper one but not much used at present, makes it a

question for the jury whether defendant was negligent in his treatment of plaintiff, since negligence might be the selection of improper treatment as well as the improper use of a proper method. *Ibid.*

4. Where the jury specially found that defendant was negligent in his treatment of plaintiff, plaintiff was entitled to judgment, though there was no finding that the method of treatment adopted by defendant was improper. *Ibid.*

PLEADING.

See LIMITATION OF ACTIONS, 2. MANDAMUS, 4. VENDOR AND PURCHASER, 5, 6.

Admissions in pleading: Effect.

1. Formal admissions made in pleadings as to a fact should bind the pleader and dispose of the matter in the absence of some showing that would justify disregarding them. *Tollefson v. Tollefson,* 149

Sufficiency of verification: Waiver of objection.

2. Where plaintiff, without objection, retained defendant's answer to a complaint for nearly a year, it cannot, on the eve of trial, raise the question of the sufficiency of the verification by a motion to strike out the answer. *Feldmeier v. Springfield F. & M. Ins. Co.* 377

Complaint: Motion to dissolve temporary injunction.

3. A motion to dissolve a temporary injunction challenges the sufficiency of the complaint. *Pfeffer v. Milwaukee,* 514

POLICE AND FIRE COMMISSIONERS. See MUNICIPAL CORPORATIONS, 6.

POLICE OFFICERS. See MUNICIPAL CORPORATIONS, 6.

POLICE POWER. See HEALTH. RAILROADS, 3.

POSITIVE AND NEGATIVE TESTIMONY. See EVIDENCE, 11, 12.

POSSESSION. See ADVERSE POSSESSION.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 6.

PRESUMPTIONS. See APPEAL, 14. EVIDENCE, 2. FRAUDS, STATUTE OF, 2. JUSTICES OF THE PEACE, 2. MARRIAGE, 3. NEGLIGENCE, 1. STREET RAILWAYS, 6. WILLS, 9.

PRINCIPAL AND AGENT.

See AUTOMOBILES, 1. BROKERS. INSURANCE, 1. RAILROADS, 2.

Implied agency: Execution and negotiation of commercial paper.

1. The rule as to implied agencies is given a much more limited and strict application in the matter of the execution or negotiation of commercial paper than under other circumstances. *Outagamie County Bank v. Tesch,* 249

Agent acting without authority: Fraud: Warranty.

2. A son who signed his father's name to a guaranty on the back of a promissory note which had been indorsed by the father

and his own name thereunder as agent, cannot be held liable on the note unless there was some element of deceit or fraud in what he did or an express or implied warranty on his part that he had authority to act as agent. *Outagamie County Bank v. Tesch,* 249

3. Where a new note sent to a prior guarantor for his signature to a guarranty on the back of the note was returned to the payee by the son of the guarantor with his father's indorsement, but without his father's signature to the guaranty, the mere possession of the note by the son carried no implication of authority to make a substantially different contract than that evidenced by the indorsement on the back of the note. *Ibid.*

4. In an action against the son the evidence is *held* conclusively to negative any element or act of fraud or deceit practiced by the son toward the payee of the note. *Ibid.*

PRINCIPAL AND SURETY.

Time of defalcation: Proof.

In an action on a fidelity bond to recover a loss sustained by the defalcation of one of plaintiff's trustees, the time of defalcation alleged in an information charging embezzlement, to which the trustee pleaded guilty, controlled as to the time of the defalcation, in the absence of other specific evidence thereof. *Trustees, etc. v. U. S. F. & G. Co.* 210

PRINCIPAL CONTRACTOR. See ASSIGNMENTS. MUNICIPAL CORPORATIONS, 15, 16, 19.

PRIVILEGE. See LIBEL, 3. WITNESSES, 2.

PROBATE OF WILLS. See WILLS.

PROBATION. See INFANTS, 2.

PROCEDURE in criminal cases. See CRIMINAL LAW.

PROMISSORY NOTES. See BILLS AND NOTES.

PROMOTERS. See ACCOUNT. CORPORATIONS, 2.

PROVISIONAL REMEDY. See APPEAL, 2.

PROXIMATE CAUSE. See AUTOMOBILES, 3, 4. FEDERAL EMPLOYERS' LIABILITY ACT, 3. MASTER AND SERVANT, 3. NEGLIGENCE, 4–8. TRIAL, 2, 3. WORKMEN'S COMPENSATION, 5.

PUBLIC UTILITIES.

See RAILROADS. STREET RAILWAYS.

Utility operating street and interurban railways: Rates.

Where a public utility operated street railways and suburban railways as one system, the reasonableness of the rates fixed by the railroad commission as to the operation of the suburban line is not affected by the fact that such line will be operated at a loss under the rates so fixed, the test of reasonableness being the effect upon the system as a whole. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 297

PUNITORY DAMAGES. See BREACH OF MARRIAGE PROMISE, 2.

PURCHASER. See VENDOR AND PURCHASER.

QUESTIONS FOR JURY. See AUTOMOBILES, 7. FEDERAL EMPLOYERS' LIABILITY ACT, 5. HIGHWAYS, 3. NEGLIGENCE, 6, 7, 11. PHYSICIANS AND SURGEONS, 3. STREET RAILWAYS, 4. TRIAL, 4. WILLS, 2.

RAILROAD COMMISSION. See PUBLIC UTILITIES.

RAILROADS.

See PHYSICIANS AND SURGEONS, 1.

Separation of grades: In city of Milwaukee. See RAILROADS, 3–7, 9, 10.

Same: In towns. See RAILROADS, 8.

Federal control: Scope and extent.

1. The President, in taking control of the railroads under the federal control act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), did not take control merely of the physical properties, but of the entire organization, including officers, directors, and employees. *Christian v. Great Northern R. Co.* 266

Same: Service of summons on freight agent.

2. Under the federal control act, a railroad freight agent during the period of federal control was an agent of the company and a proper person upon whom to serve the summons against the company, under sub. (6), sec. 2637, Stats. 1917. *Christian v. Great Northern R. Co.* 266

Same: Director general. See APPEAL, 4.

Separation of grade crossings: Expense. See EMINENT DOMAIN.

3. The state may require the separation of grade crossings as a matter of police regulation, and place the burden on the railroad or the municipality, or apportion it as it sees fit. *Application of Kaiser,* 40

Same: Power of city of Milwaukee to assume expense: Ordinance as order: Validity.

4. Sub. 48, sec. 3, ch. IV, of the Milwaukee city charter (Laws 1874, ch. 184), authorizing the common council to require railroad companies to construct viaducts at highway crossings, prohibits the city from assuming expense in connection with such work though the railroad is the senior way. *Application of Kaiser,* 40

5. Said sub. 48 is construed to authorize the common council to require a railroad company to construct a subway at the time a street is first opened to travel. *Ibid.*

6. Under said sub. 48, an ordinance requiring the construction of a subway was *ultra vires* so far as it placed the expense of the construction of the approaches on the city, and must be treated as an order to the railroad company to do the work at its own expense. *Ibid.*

Same: Subway on boundary street: Agreement of adjoining town.

7. Where the boundary between a city and a town was the middle of a street, the city had the same power to compel a railroad company to construct a subway under its right of way in the part of the street within the city limits that it would have to compel it to do so on any other street in the city, the town having agreed to the improvement. *Application of Kaiser,* 40

Same: Expense of separation of grades in towns.

8. Under sec. 1299*h*, Stats., authorizing town officials to agree with railroad companies regarding the construction of overhead or underground crossings, a railroad company is not liable for any of the expenses of construction of a subway unless it assumes such expenses by agreement with the town, and cannot be compelled to pay damages to an abutter on the street cut down to provide an approach to the subway. *Application of Doss,* 52

Damages to railroad by opening of highway.

9. The damages to which a railroad company is entitled for the opening of a highway across its road do not include the cost of constructing a subway pursuant to sub. 48, sec. 3, ch. IV, of the Milwaukee city charter. *Application of Kaiser,* 40

Damages to property owners: Effect of railroad accepting ordinance.

10. A railroad company accepting a city ordinance and constructing a subway under its right of way cannot urge that at the time the ordinance was passed the street had been abandoned, under sec. 1294, Stats., in order to defeat liability for damages to property owners. *Application of Kaiser,* 40

Accidents at crossings: Failure to look for train. See WITNESSES, 3.

11. The driver of an automobile who, when approaching a railroad track of which he has an unobstructed view, fails to look for an oncoming train, or who, seeing a train approaching, attempts to cross in front of it, is in either case guilty of more than a slight want of ordinary care. *Puhr v. Chicago & N. W. R. Co.* 154

12. If an automobile driver, observing an oncoming train, proceeds, in ignorance of the defective condition of the stopping mechanism, with the intention of stopping before reaching the tracks, but upon seasonable effort to stop fails to avoid going upon the tracks because of such defect, he is not guilty of any degree of negligence. *Ibid.*

13. A driver who approaches a railroad track with knowledge of the defective condition of the stopping mechanism without so decreasing his speed as to be able to bring the automobile to a stop notwithstanding defects, is guilty of more than a slight want of ordinary care. *Ibid.*

Injuries to employees. See APPEAL, 5. FEDERAL EMPLOYERS' LIABILITY ACT. NEGLIGENCE, 6.

RATES. See PUBLIC UTILITIES.

RATIFICATION. See MASTER AND SERVANT, 2.

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See ADVERSE POSSESSION. BOUNDARIES. BROKERS. CONVERSION. CORPORATIONS, 3. COSTS, 1. CUSTOM. DEEDS. EMINENT DOMAIN. LANDLORD AND TENANT. LIMITATION OF ACTIONS. NUISANCE. TAXATION, 8, 9. VENDOR AND PURCHASER.

RECEIVERS. See CORPORATIONS, 6.

RECORD. See MOTIONS.

REFEREE. See APPEAL, 20. CORPORATIONS, 9.

REFORMATION OF INSTRUMENTS.

Mistake in written instruments: Degree of proof.

1. In cases of reformation of written instruments because of mistake, the evidence must clearly show the terms of the oral agreement and that the writings sought to be so reformed do not express such oral agreement but a different one. *Pickard v. Farmers & Merchants Bank,* 167

Same: Failure to read instruments.

2. Where plaintiff applied for a loan from a bank for $11,500, the unpaid portion of the purchase price of land bought by him; but the cashier erroneously inserted $12,500 in the notes and mortgage given for the loan, and the bank paid such amount to the seller, plaintiff is entitled to reformation and adjustment of the rights of the parties in accordance therewith, though he did not read the notes and mortgage given for the loan to ascertain whether they correctly expressed the oral agreement, but relied upon the cashier. *Pickard v. Farmers & Merchants Bank,* 167

Right to reformation raised by answer: Trial.

3. Where an answer alleged that the plaintiff's agreement to furnish steam to defendant was limited to the time defendant also occupied its premises and that such agreement was, through mutual mistake, omitted from the written contract, defendant was entitled to litigate the issue of right to reformation for mistake. *American S. L. Co. v. Riverside P. Co.* 644

REFRESHING MEMORY. See WITNESSES, 3.

REMAINDERS. See TAXATION, 8.

RENT. See LANDLORD AND TENANT.

REPAIRS. See LANDLORD AND TENANT, 3.

RESCISSION. See GUARANTY.

RESIDUARY CLAUSE. See WILLS, 8.

RES IPSA LOQUITUR. See MASTER AND SERVANT, 4.

RESISTING OFFICER. See HOMICIDE, 2, 4.

RESTRAINING ORDER. See INJUNCTION.

RETURN to supreme court. See APPEAL, 7.

ROADS AND STREETS. See AUTOMOBILES. BRIDGES. HIGHWAYS. RAILROADS, 3–10.

RULES OF COURT.
Circuit Court Rule XIX (Continuances), 23.
Circuit Court Rule XXIII (Exceptions), 243, 247.

SALES.

See AUCTIONS AND AUCTIONEERS. CONTRACTS, 2. FRAUDS, STATUTE OF, 1. GUARANTY.

Acceptance of payment conditionally: Evidence: Delay.

1. In an action by ice brokers for a breach by defendant of his contracts, assigned to them by the buyer, to sell and deliver ice, the evidence is *held* insufficient to support a finding that the defendant seller accepted a sight draft for $500 as the first payment on one of the contracts on condition that the plaintiff brokers should promptly pay the balance then due on the other, and that they did not promptly pay such balance. *Wilbur v. Means,* 401

2. Though an unreasonable time elapsed before the buyers of the ice made payment to the seller, a breach of the contract was not the necessary or inevitable result, which, under sub. 2, sec. 1684*t*—45, Stats., depended on the terms of the contract and the circumstances of the case. *Ibid.*

Same: Custom between parties as to payments: Effect.

3. Where buyers of ice did not make prompt payment for each car as received, they had a right to assume that similar dealings with reference to a completed contract would be satisfactory to the seller, who was under the duty to bring home to them the fact that he expected prompt payment for each car of ice shipped under the contract being then performed, if he intended to insist on such construction of the contract. *Wilbur v. Means,* 401

Conditional sale contract: Constructive notice.

4. The filing of a conditional sale contract in the proper office, no time being fixed in the contract for the payment of the purchase price of the article sold, is not constructive notice of the sale, such contract not being entitled to filing under sec. 2317, Stats. *Ford Motor Co. v. Maeder,* 263

SCHOOLS AND SCHOOL DISTRICTS. See MANDAMUS, 3.

SEDUCTION. See BREACH OF MARRIAGE PROMISE.

SEPARATE ESTATE. See HUSBAND AND WIFE, 1.

SEPARATION OF GRADES.
In cities. See EMINENT DOMAIN. RAILROADS, 3–7, 9, 10.
In towns. See RAILROADS, 8.

SERVANT. See MASTER AND SERVANT.

SERVICE of summons. See APPEAL, 7. RAILROADS, 2.
SETTLEMENT. See COMPROMISE AND SETTLEMENT.
SEWERS. See MECHANICS' LIENS.

SHERIFFS AND CONSTABLES.

See CONSTITUTIONAL LAW, 5–7. COSTS, 2. MANDAMUS, 4.

Eligibility of one appointed sheriff to succeed himself: Vacancy in office.

1. Under sec. 4, art. VI, Const., providing that sheriffs shall be ineligible to office for two years next after termination of their offices, that all vacancies shall be filled by appointment, and that the person appointed shall hold only for the unexpired portion of the term, one appointed to fill a vacancy in the office of sheriff is ineligible to succeed himself, as he holds the office for all purposes as completely and fully as did the elected sheriff. *State ex rel. Knutson v. Johnson,* 521
2. Where one appointed to fill a vacancy in the office of sheriff was elected to such office for the succeeding term, although he was ineligible under sec. 4, art. VI, Const., there was a vacancy in the office after the expiration of the appointive term. Sub. (6), sec. 17.03, Stats., declaring that a public office becomes vacant upon the decision of a competent tribunal declaring void the election or appointment of one claiming it, also applies, and in this case there is a vacancy authorizing an appointment. *Ibid.*

Appointment of deputies: Term.

3. A deputy sheriff appointed by the sheriff under the provisions of sec. 723, Stats. 1915, which provides that every deputy holds his office at the pleasure of the sheriff, was not appointed for a definite term within the meaning of the county civil service law (ch. 259, Laws 1917: secs. 16.31 to 16.44, Stats. 1919). *State ex rel. Milwaukee County v. Buech,* 474

Same: Civil service: Constitutionality: Waiver of irregularities.

4. Ch. 259, Laws 1917 (secs. 16.31 to 16.44, Stats. 1919), prohibiting a sheriff from appointing deputies except such as are certified as eligible by the civil service commission, is not unconstitutional in that it detracts materially from the powers, duties, and liabilities of the sheriff, the power of the sheriff at common law to appoint deputies not being one that gave character and distinction to the office. *State ex rel. Milwaukee County v. Buech,* 474
5. By accepting from the civil service commission and acting upon an incomplete and uncertified list of persons eligible to hold the office of deputy sheriff, a sheriff waived informalities and noncompliance with the statute; and a person appointed by the sheriff from such list holds his office pursuant to the civil service law. *Ibid.*

SLANDER. See EVIDENCE, 12. LIBEL AND SLANDER.
SPECIAL LEGISLATION. See CONSTITUTIONAL LAW, 8, 9.

SPECIAL PROCEEDING. See APPEAL, 1, 2.

SPECIAL VERDICT. See APPEAL, 26, 27. AUTOMOBILES, 1, 5–7. CONSPIRACY, 3. TRIAL, 2–4.

SPECIFIC PERFORMANCE.

Expression of intention as contract: Definiteness.

1. The expression of an intention by the purchaser of real estate and personal property to raise money to meet a future payment by executing and selling a mortgage on his homestead, is not a contract that can be specifically performed. *Katzer v. Schuenke,* 605
2. Even if such expression of intention be regarded as a contract, specific performance thereof could not be granted, neither the amount of the mortgage, its term, how payable, nor the mortgagee being shown. *Ibid.*

STATES.

See APPEAL, 4. CONSTITUTIONAL LAW. FEDERAL EMPLOYERS' LIABILITY ACT, 2. HEALTH. RAILROADS, 3.

Conflict between state and federal laws: National banks as fiduciaries.

The state statute (sec. 2024—*77r,* Stats.) prohibiting courts from appointing as trustees or other fiduciaries corporations not organized under secs. 2024—*77i* to 2024—*77q* must yield to sec. 11 (k) of the act of Congress of December 23, 1913 (38 U. S. Stats. at Large, 251, ch. 6), establishing the federal reserve board and authorizing such board to permit national banks to act as fiduciaries when not in contravention of state or local law, and the amendment of September 26, 1918 (40 U. S. Stats. at Large, 968, ch. 177), declaring that, if the state law permits banks, trust companies, or other corporations which compete with national banks to exercise fiduciary powers, the granting and exercise of these powers by national banks shall not be deemed in contravention of state or local law; and the request of the petitioner that a national bank be appointed executor of his father's estate should have been granted. *Estate of Stanchfield,* 553

STATE TREASURER. See BANKS, 1.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW.

Construction. See ADVERSE EXAMINATION, 1. APPEAL, 1, 2, 4. BANKS, 1, 3. BILLS AND NOTES, 1. CONSTITUTIONAL LAW, 8. DIVORCE, 6–8. DRAINS. FRAUDS, STATUTE OF, 1. GAME. HOMICIDE, 4. INFANTS, 1. INJUNCTION. JUSTICES OF THE PEACE. LANDLORD AND TENANT, 2. LIMITATION OF ACTIONS, 1. MANDAMUS, 3, 4. MARRIAGE, 1, 4, 5, 8. MUNICIPAL COR-

PORATIONS, 2, 6, 17, 18. NEGLIGENCE, 3. RAILROADS, 1, 2, 8, 10. SALES, 2, 4. SHERIFFS, 2, 3. STATES. TAXATION. VENDOR AND PURCHASER, 1. WILLS, 7. WORKMEN'S COMPENSATION.

Words used in a section of the income tax statute must be given their ordinary and usual meaning. *State ex rel. Houghton v. Phelps,* 13

Subsequent enactments. See CONSTITUTIONAL LAW, 7.

STOCK. See ACCOUNT.

STOCKHOLDERS. See CORPORATIONS. TAXATION, 9.

STREET RAILWAYS.

See PUBLIC UTILITIES.

Ordinance regulating speed of cars: Railway crossing street.

1. The track of an interurban electric railroad crossing a city street is maintained "upon" such street within the meaning of a city ordinance to the effect that no motorman in charge of an interurban car propelled by electricity shall operate any such car "upon or along any railroad track laid and maintained on any public street" at a greater rate of speed than fifteen miles per hour. *Merrill v. C., N. S. & M. R. R.* 464

Crossing in front of car: Contributory negligence. See AUTOMOBILES, 2, 7.

2. The stopping of a street car at a customary place for discharging and taking on passengers is not an invitation to a traveler in an automobile to cross ahead of it; and if he is so situated that the street car can safely start and safely continue if he yields the right of way and can safely do so, the car may proceed upon its trip. *Dering v. Milwaukee E. R. & L. Co.* 8

3. In an action for damages to an automobile in a collision with a street car at a street intersection, the evidence is *held* sufficient to sustain a finding of contributory negligence of plaintiff, although the street car ran into the automobile. *Ibid.*

4. In an action against an interurban electric railroad for damages sustained when one of its cars collided with an automobile at a place where the tracks crossed a city street, the question of whether the driver was guilty of contributory negligence is for the jury. *Merrill v. Chicago, N. S. & M. R. R.* 464

Same: Pedestrian crossing in front of car: Contributory negligence.

5. In an action to recover for injuries to a woman eighty-six years old who was struck by a street car while attempting to cross the street ahead of the car, the jury having found that the car was being run at a dangerous and unreasonable rate of speed, the testimony of an eye-witness of the accident is *held* to support a finding of the jury that plaintiff did not look before entering the danger zone, as against a conten-

tion that the finding was contrary to the established physical facts. *Pinz v. Milwaukee E. R. & L. Co.* 11

6. Where there was evidence of want of care on the part of plaintiff, an instruction that she was presumed to have looked and listened before entering the danger zone, that she conducted herself as the greater mass of women of her age and infirmities would have conducted themselves under the same circumstances, and that she was presumed to exercise the care that women of her age and infirmities would have exercised under the same circumstances, was properly refused, as not being a correct statement of the law applicable to the case. *Ibid.*

STRIKES. See INJUNCTION.

SUBAGENTS. See BROKERS, 2, 3, 5.

SUBCONTRACTORS. See MUNICIPAL CORPORATIONS, 15, 16, 19.

SUBSTITUTION of attorneys. See ATTORNEY AND CLIENT, 1.

SUBURBAN RAILWAYS. See PUBLIC UTILITIES.

SUBWAYS. See RAILROADS, 8–10.

SUNDAY.

Contracts: Negotiations had on Sunday.

Where negotiations for a contract are made on Sunday, and on a subsequent secular day an act is done by the parties which completes the void Sunday contract, the Sunday negotiations are deemed reaffirmed on such subsequent secular day, and thus form the basis of either validating the void Sunday contract or of showing liability for a tort which induced the execution of the new or completed contract on the secular day. *Mann v. Becker,* 121

SUPPRESSION of adverse examination. See APPEAL, 1.

SUPREME COURT. See APPEAL.

SURETY. See PRINCIPAL AND SURETY.

SURGEONS. See PHYSICIANS AND SURGEONS.

TAXATION.

Income tax law: Partnership of lawyers.

1. A firm or partnership composed of three lawyers, who shared expenses and divided profits, was a "firm" or "copartnership" within the meaning of sub. 1, sec. 1087*m*—2, Stats., defining the term "person" as used in the income tax statute. *State ex rel. Houghton v. Phelps,* 13

Same: Deductions: Fees earned prior to enactment of law: Services of members.

2. Under sec. 1087*m*—1, providing for the assessment, levy, collection, and payment of a tax on incomes received during the year ending December 31, 1911, and on incomes received annually thereafter, where a large fee earned by a firm of lawyers was paid in 1916, such firm, in returning its income

for tax purposes, was not entitled to deduct the amount of expenses in the particular litigation incurred and the proportion of the fee earned prior to January 1, 1911. *State ex rel. Houghton v. Phelps,* 13

3. Under sub. (a), sec. 1087*m*—4, a firm of lawyers, who had received in 1916 a fee for legal services beginning in 1909, were entitled, in the computation and return of the income of the firm for tax purposes, to a reasonable allowance for services of members actually rendered in producing the income, irrespective of the time when the services were rendered, whether in 1916 or prior years, and to the amount which the firm distributed among its members as their earnings in relation to the particular matter. *Ibid.*

Inheritance tax: Upon what imposed.

4. The inheritance tax act (secs. 1087—1 *et seq.,* Stats.) imposes a tax on the right to transfer the estate of a decedent to another person, and not upon the estate itself, which is only the measure of the tax. *Estate of Stephenson,* 452

Same: Time when tax imposed: Property conveyed prior to death.

5. The inheritance tax act imposes a tax on the transfer of the estate of a decedent as of the time of the death of the transferor, at which time the tax accrues and the transfer takes place, so that the value of testator's property passing under a trust declared prior to his death was properly added to the value of the property passing under the will, and the tax assessed on the sum of both instead of on each transfer separately at the rate in effect at the time of his death. *Estate of Stephenson,* 452

Same: Gifts in contemplation of death.

6. Whether a gift is such a material part of a testator's estate as to be deemed to have been made in contemplation of death and therefore subject to the inheritance tax imposed by secs. 1087—1 *et seq.,* is in each case a judicial question. *Estate of Stephenson,* 452

7. In proceedings to assess against a decedent's estate the inheritance tax provided by secs. 1087—1 *et seq.,* the facts and circumstances are *held* to justify the finding of the county court that a gift to testator's daughter of $23,000 was made in contemplation of death and was therefore taxable. *Ibid.*

Same: Value of property: Estates divided into terms.

8. Under the inheritance tax act the state is entitled to a tax measured by the clear market value of the property transferred, and the value of the estate for taxing purposes cannot be diminished by dividing it into term estates and remainders; and if a contingent remainder is defeated and the estate passes to another remainderman, an adjustment pursuant to sub. 6 and 8, sec. 1087—15, will be made. *Estate of Stephenson,* 452

Same: Trust affecting lands in another state.

9. In view of a trust agreement providing, among other things, that real estate may be sold though a sale is not compelled; that the personal property and the real estate constitute but one fund; that ownership in certificates passes by assignment; that it gives no title in the trust property; that it does not descend to the heirs but goes to the administrator or executor; and that the trust does not constitute a partnership,—shares or certificates owned by the testator in a trust created by stockholders of his lumber company in another state where it owned lands are *held* personalty for the purpose of subjecting them to an inheritance tax under secs. 1087—1 *et seq.* *Estate of Stephenson,* 452

TEMPORARY INJUNCTION. See INJUNCTION. PLEADING, 3.

TENDER.

Failure to comply with statute or rules of court.

Defendant's tender to plaintiff of an amount in excess of that found due him, which was not in form a compliance with the statute or rules of court, does not become material in the disposition of the case. *Tollefson v. Tollefson,* 149

TERM of sheriffs. See SHERIFFS, 1–3.

TERMINATION of contract. See CONTRACTS, 4, 5.

TESTAMENTARY CAPACITY. See APPEAL, 24. NEW TRIAL, 1. WILLS, 1, 3, 4.

THEFT. See INFANTS, 2.

TITLE.

To land. See ADVERSE POSSESSION. BOUNDARIES. BROKERS, 1. CUSTOM. DEEDS. EVIDENCE, 6, 9. LIMITATION OF ACTIONS. MORTGAGES. NUISANCE. SPECIFIC PERFORMANCE. TAXATION, 8, 9. VENDOR AND PURCHASER.

To personal property. See AUCTIONS AND AUCTIONEERS. BANKS, 3, 4. BILLS AND NOTES, 2. CHATTEL MORTGAGES. CORPORATIONS, 5. COSTS, 1. EVIDENCE, 3, 7. FRAUDS, STATUTE OF. GIFTS. HUSBAND AND WIFE, 1. LANDLORD AND TENANT, 1. MORTGAGES, 5. NEW TRIAL, 2. SALES. TAXATION, 9. WAR, 1. WILLS, 3.

TORTS. See ACCOUNT. AUTOMOBILES. BREACH OF MARRIAGE PROMISE. BROKERS, 4–6. CHATTEL MORTGAGES. COMPROMISE AND SETTLEMENT. CONSPIRACY. CORPORATIONS, 1, 2, 6–10. GAME. HUSBAND AND WIFE, 2. LIBEL. MARRIAGE, 6–8. NEGLIGENCE. PHYSICIANS AND SURGEONS, 2–4. PRINCIPAL AND AGENT, 2, 4. SUNDAY. WORKMEN'S COMPENSATION.

TOWNS. See RAILROADS, 7, 8.

TRADING WITH THE ENEMY. See WAR.

TRANSPORTATION of pupils. See MANDAMUS, 3.

TRESPASS. See GAME. HUSBAND AND WIFE, 2. NEGLIGENCE, 3.

TRIAL.

Right to trial. See CONSTITUTIONAL LAW, 4.
Separate trials in criminal cases. See CRIMINAL LAW, 11, 12.
Bringing in new parties. See APPEAL, 2.
Adverse examination. See ADVERSE EXAMINATION. APPEAL, 21.
Tender of judgment. See TENDER.
Continuance: Grounds. See CONTINUANCE.
Substitution of attorneys. See ATTORNEY AND CLIENT.
Evidence: Judicial notice. See EVIDENCE, 1.
Same: Presumptions. See EVIDENCE, 2. PRESUMPTIONS.
Same: Admissions. See EVIDENCE, 3.
Same: Photographs. See EVIDENCE, 4, 5.
Same: Parol evidence. See EVIDENCE, 6–10.
Same: Positive and negative testimony. See EVIDENCE, 11, 12.
Degree of proof. See CONSPIRACY, 2. CRIMINAL LAW, 8. REFORMATION OF INSTRUMENTS, 1.
Questions for jury. See QUESTIONS FOR JURY.
Nonsuit. See WORKMEN'S COMPENSATION, 2.
Argument to jury. See CRIMINAL LAW, 13.
Confession of judgment. See BILLS AND NOTES, 1.
Expediting disposition of cases.
1. Any policy adopted by trial courts which tends to expedite the disposition of cases will not be frowned upon by the supreme court where it appears that no substantial rights of litigants have been prejudiced. *Baraboo v. Excelsior C. Co.* 242

Instructions. See INSTRUCTIONS TO JURY.
Same: Exceptions to instructions. See APPEAL, 6.
Special verdict: Subdivision of issues: Instructions. See SPECIAL VERDICT.
2. A special verdict calling for findings as to whether the driver of a truck was negligent, and, if so found, whether it proximately contributed to the collision, the insufficiency or want of repair of the highway and whether it proximately contributed to a collision, is sufficient, when submitted with proper instructions, it being unnecessary and bad practice to divide and subdivide the issues by questions in the nature of a cross-examination of the jury. *Baraboo v. Excelsior C. Co.* 242

Same: Change of answers by court. See APPEAL, 28.
3. Where a collision between two automobiles would not have occurred but for the excessive speed at which the plaintiff was driving, the plaintiff's negligence was the proximate cause of the collision, and the court properly changed the jury's answer to a question as to whether such negligence was the proximate cause from "No" to "Yes." *Haswell v. Reuter,* 228

Same: Advisory verdict.

4. Where a verdict of the jury was advisory only, the court was not bound by it, and could change the answers of the jury to special questions when it found they were not supported by the preponderance of the evidence, and was not required to submit the issues of fact to another jury. *Will of Keenan,* 94

Instructions: Positive and negative testimony. See EVIDENCE, 11, 12.

5. An instruction as to positive testimony outweighing negative testimony which did not define what constitutes negative testimony is objectionable. *Suick v. Krom,* 254

Same: Calling court's attention to mistakes.

6. While to constitute error for a refusal to charge the jury as requested, the request should be submitted to the court in writing before the argument is begun (Circuit Court Rule XXIII), counsel may properly, at the conclusion of the charge, call the attention of the court to inadvertencies, omissions, or errors in the instructions. *Baraboo v. Excelsior C. Co.* 242

Same: View of premises: Purpose: Harmless error.

7. A view of the scene of an accident is taken for the purpose of enabling the jury to understand the evidence, and an instruction that the verdict must be based on the evidence and upon the view is error; but where there was nothing in the view which would enable the jury to determine which party was at fault, such error is not prejudicial. *Haswell v. Reuter,* 228

Discharge of defendant by court. See CRIMINAL LAW, 14, 17, 18.

Reference. See APPEAL, 20. CORPORATIONS, 9, 10.

New trial. See NEW TRIAL.

Bill of exceptions: Extension of time. See APPEAL, 9.

TRUST DEEDS. See CORPORATIONS, 3–5. COSTS, 1.

TRUSTS. See PRINCIPAL AND SURETY. STATES. TAXATION, 5, 9. WILLS, 8.

UNDERGROUND CROSSINGS. See RAILROADS, 8.

UNDUE INFLUENCE. See COMPROMISE AND SETTLEMENT, 1. WILLS, 2.

UNIFORM SYSTEM OF LOCAL GOVERNMENT. See CONSTITUTIONAL LAW, 6.

UNITED STATES. See FEDERAL EMPLOYERS' LIABILITY ACT. RAILROADS, 1, 2.

UNITED STATES MARSHALS. See HOMICIDE, 1, 4.

VACANCY in office. See SHERIFFS, 2.

VACATION.
Of judgment. See DIVORCE, 6–8. JUDGMENT.
Of service of summons. See APPEAL, 7.

VENDOR AND PURCHASER.

See BROKERS, 2–6. MORTGAGES, 5.

Contract of sale: Receipt for part purchase price: Description of property.

1. A receipt for a payment of $20 as security to apply on the purchase price of a house, stating the price and signed by the seller, who appended his own street number, which was not the number of the house sold, was not a contract, and, even if it constituted a contract, was void under the statute of frauds (sec. 2304, Stats.) as failing to describe the property sold. *Mann v. Becker,* 121

Same: Promises as fraudulent representations: Recovery of damages.

2. Promises by the vendor of land as to plowing and planting it and the construction of a railroad and warehouse thereon, though not sufficient to constitute the basis of an action for fraudulent representations, are nevertheless valid agreements, for a breach of which damages may be recovered. *Clark v. Horicon State Bank,* 133

Duty of vendor to furnish abstract. See AUCTIONS AND AUCTIONEERS. CUSTOM.

3. A vendor is not required to furnish the purchaser an abstract of title where the contract of sale is silent on the subject. *Clarke v. Maisch,* 225

4. Announcement by an auctioneer at a sale of lots that clear title would be conveyed and that an abstract of title was at a certain bank for the use of all purchasers if they desired to examine the title, implies that purchasers are not to be furnished abstracts with their deeds. *Ibid.*

Action for purchase price: Failure of title: Parties.

5. Where a defendant's answer and counterclaim in an action on a purchase-price note alleged that the deed from plaintiff and his co-grantor embraced land to which they had no title, the co-grantor was a necessary party where the covenants in the deed were joint and not joint and several. *Rowell v. Rhadans,* 86

Same: Damages: Mutual mistake: Pleadings.

6. Where a defendant purchaser alleged that plaintiff had no title to part of the land deeded, and plaintiff's reply was merely a general denial, defendant was entitled to recover the value of the land as to which title had failed upon the execution of the deed being admitted, the question whether the description in the deed was inserted by mutual mistake not being presented by the pleadings. *Rowell v. Rhadans,* 86

VERIFICATION. See PLEADING, 2.

VIADUCTS. See RAILROADS, 4.

VIEW. See TRIAL, 7.

VOLUNTARY CONFESSIONS. See CRIMINAL LAW, 5, 6.

WAIVER.
Of action. See MUNICIPAL CORPORATIONS, 14.
Of civil service regulations. See SHERIFFS, 5.
Of objections at trial. See APPEAL, 3, 4.
Of right to appeal. See JUDGMENT.

WAR.

Alien property custodian: Title to enemy property.

1. The alien property custodian appointed by the President under the act of October 6, 1917, as amended March 28, 1918, and November 4, 1918, prohibiting trading with the enemy, is vested with the interest and qualified title to the moneys and property of the enemy to the exclusion of such enemy. *Youghiogheny & Ohio C. Co. v. Lasevich,* 347

Same: Action to review award of industrial commission: Alien property custodian as necessary party.

2. The alien property custodian is a necessary party to actions involving the property acquired by him, he being the government's representative to protect its rights and those of the alien enemy; and in an action to review an award made by the industrial commission to nonresident alien enemies he is an "adverse party" under sec. 2394—19, Stats., requiring an adverse party to be made a defendant to such action. *Youghiogheny & Ohio C. Co. v. Lasevich,* 347

WARRANTY of agency. See PRINCIPAL AND AGENT, 2, 3.

WILLS.

See CONTINUANCE, 4. CONVERSION. EVIDENCE, 3. EXECUTORS. GIFTS, 2, 3. TAXATION, 5, 7.

Testamentary capacity: Evidence. See TESTAMENTARY CAPACITY.

1. In a proceeding for the probate of the will of an aged widow, the evidence is *held* to sustain the conclusion of the court that testatrix was of sound and disposing mind when she executed the will and the codicils attached thereto. *Will of Keenan,* 94

Same: Undue influence: Trial.

2. There being no evidence to sustain the claim that a will was the result of undue influence, the court properly withdrew the inquiry on this issue from the jury. *Will of Keenan,* 94

Execution and form: Bill of sale as will.

3. A bill of sale of "all our personal property which we may possess at our death," conveys no present title and is purely testamentary, and, not being executed as required for the execution of wills, is ineffective. *Estate of Salzwedel,* 441

Application to appeal from order admitting will to probate.

4. On the record and papers accompanying an application by attorneys, to whom an absent heir had intrusted his business affairs before leaving, to permit an appeal in order to show that the testatrix was mentally incapable of making a will,

it is *held* that the conclusion of the circuit court that justice does not require a revision of the judgment of the county court is warranted by the evidence. *Will of McGinty,* 184

Fees and costs: Proponent failing to prosecute appeal.

5. Where proponent, on appeal from a judgment of the county court denying probate of a will, failed to appear in the circuit court or offer any testimony in support of the will, on appeal from a judgment dismissing such appeal he was not entitled to attorney's fees out of the estate, under sec. 4041*b*, Stats. *Will of Bilty,* 20

Same: Good faith of contestant.

6. Where the contestant of a will has acted in good faith in taking an appeal to the supreme court, and the questions of law or fact involved are worthy of consideration, it will order the costs taxed against contestant to be paid out of the estate. *Will of Bilty,* 20

Construction of will: Devise during widowhood.

7. A clause in a will devising lands to testator's wife "so long as she remains my widow" is construed to convey a fee subject to be divested upon the remarriage of the widow; sec. 2278, Stats. (declaring that every devise of land shall be construed to convey all the estate of the devisor therein unless it shall clearly appear by the will that a less estate was intended), giving to the devise the same effect as if words of inheritance had been used. *Will of Baird,* 215

Same: Certainty as to beneficiaries: Free medical dispensaries.

8. The residuary clause of a will giving the residue to trustees who were to establish and carry on one or more free medical dispensaries, etc., is not subject to the objection that it was uncertain as to beneficiaries, contradictory in terms, and conferred on the trustees powers in conflict with the law, so as to remove them from the supervision and control of the courts. *Will of Keenan,* 94

Legacies: Creditor as legatee: Presumption. See APPEAL, 19.

9. Where a bequest is made in a will equal to or greater in amount than a debt owing from the testator to a legatee, the presumption, in the absence of other facts and circumstances showing a contrary intent, is that the bequest is in payment of the debt, especially where the time and manner of payment are the same, although such presumption is readily rebuttable by facts and circumstances showing a different intent. *Kupsick v. Diestelhorst,* 519

Same: Legacy as payment of debt.

10. Where a widower in an ante-nuptial contract agreed to pay his intended wife $3,000 on his death, and died possessing an estate of $32,000 which had been accumulated largely by the help of one of his four sons, with all of whom he was on good terms, the trial court properly found that a bequest of $3,000 to the widow was in payment of the debt created by the ante-nuptial agreement, decedent also bequeathing to the

widow all his furniture and one fifth of the residuary estate. *Kupsick v. Diestelhorst,* 519

Same: Interest as incident to legacy: When payable.

11. Interest is due on legacies, not as a penalty for nonpayment on demand or a default in payment, but as a part of or incident to the legacy itself. *Will of Payne,* 608

12. Where testatrix, recognizing that it might be inexpedient to immediately settle her estate, authorized the executors to pay certain legacies after three years, and, if necessary, to delay payment of other legacies for a period not to exceed five years, and provided that when the estate, or portions thereof, were sold the moneys derived from such sales should be applied from time to time to settle certain of the legacies, with interest at five per cent. per annum, interest on such legacies was not payable annually, but, in accordance with the rule applicable to contracts, at the time the legacies were payable. *Ibid.*

WINDING UP CORPORATION. See CORPORATIONS, 6–10.

WITNESSES.

See APPEAL, 18, 23. CONTINUANCE, 2–4. CRIMINAL LAW, 20. EVIDENCE, 13.

Qualifications of witnesses as to character.

1. At the trial of the defendant on a charge of incest, testimony of three witnesses to his bad reputation for chastity and morality should have been stricken out and the jury admonished to disregard it, where it appeared on cross-examination that each witness had heard no one discuss such reputation except the others. *Schwartz v. State,* 306

Same: Prejudiced witnesses. See ARSON.

Privileged communications: Husband and wife.

2. Statements by a husband to his wife, no one else being present, are privileged and confidential communications, and cannot be testified to by her, without his consent, to impeach him as a witness, even in an action to which neither is a party or is interested. *Kaspar v. Murray,* 295

Examination: Refreshing memory of witness.

3. In an action against a railroad company for the loss of support occasioned the plaintiffs by the killing of their son, the inquiry as to whether a train came to a stop at a certain crossing being material, and the engineer, called adversely by the plaintiffs, having testified that he did not stop his train at the crossing, it was proper for defendant's counsel, for the purpose of refreshing the memory of the witness, to exhibit to him his signed statement made shortly after the accident; and the volunteered remark of the engineer, that the statement said he stopped, not being attributable to defendant's conduct of the examination, the court erred in awarding a new trial to plaintiffs solely on the ground of the remark of the witness. *Goldberg v. C. & N. W. R. Co.* 447

Impeachment: Former conviction. See MORTGAGES, 1.

4. In a prosecution for murder it was improper to introduce in evidence the decision of the supreme court of another state discharging defendant from imprisonment on a conviction of felony in such state, where the conviction referred to was admitted by defendant on the trial, a former conviction being competent evidence only under sec. 4073, Stats., as affecting credibility, and provable only by cross-examination of the defendant or by the record. *Hamilton v. State,* 203

WORDS AND PHRASES.

Adverse party, in statute. See WAR, 2. WORKMEN'S COMPENSATION, 9.

Care, custody, maintenance, and education, in judgment. See p. 192.

Charter, in constitution. See CONSTITUTIONAL LAW, 8. MUNICIPAL CORPORATIONS, 2.

Copartnership, in statute. See TAXATION, 1.

Firm, in statute. See TAXATION, 1.

Forfeiture, in statute. See p. 276.

Fully settled, in bond. See MUNICIPAL CORPORATIONS, 16.

Machinery, in statute. See MECHANICS' LIENS.

Negative testimony. See p. 257.

Permanent improvements, in contract. See LANDLORD AND TENANT, 3.

Person, in statute. See TAXATION, 1.

So long as she remains my widow, in will. See WILLS, 7.

Special proceeding, in statute. See APPEAL, 1, 2.

Upon, in city ordinance. See STREET RAILWAYS, 1.

While, in contract. See CONTRACTS, 3.

WORKMEN'S COMPENSATION.

Claim for compensation as notice of personal injury.

1. A notice of claim for compensation based upon the statutory right conferred on an injured employee by the workmen's compensation act, and subsequent proceedings before the industrial commission, with actual knowledge to the employer, is not the written notice contemplated by sub. (5), sec. 4222, Stats., providing that no action to recover damages for personal injuries shall be maintained unless a written notice is served within two years by the injured person upon the person by whom it is claimed the damage was caused. *Brunette v. Brunette,* 366

2. A dismissal of proceedings before the industrial commission cannot be considered in substance or effect as analogous to a nonsuit in a court of proper jurisdiction after which a second suit for the same cause of action may be instituted and the first cause be considered as a substantial compliance with sub. (5), sec. 4222, Stats., requiring notice of a claim for damages to be served within two years on the party causing the injury. *Brunette v. Brunette,* 366

Powers of industrial commission: Certifying proceedings to court or other tribunal.

3. The industrial commission, under the workmen's compensation act, is an administrative body and not a court, having no powers other than those granted it by the statutes of its creation, and no power to certify or send proceedings brought before it to any court or other tribunal. *Brunette v. Brunette,* 366

4. Proceedings brought by an injured servant before the industrial commission under the workmen's compensation act cannot be held to be the situation contemplated by sec. 2836*b*, Stats., under which a party who is mistaken as to his remedy or as to the jurisdiction of the court may have his proceedings certified to some other court which has jurisdiction. *Ibid.*

Proximate cause of death: Refusal to comply with treatment prescribed by physician.

5. In proceedings for compensation for the death of an employee alleged to be due to a bruise on the shin, the defense being that the proximate cause of death was the refusal of deceased to follow the treatment prescribed by his physician, the evidence is *held* to support a finding of the industrial commission that the accidental bruise was the proximate cause of death. *E. Weiner Co. v. Freygang,* 187

Questions of dependency: Children of divorced parents.

6. Under sub. 3 (c), sec. 2394—10, Stats., providing that a child under the age of eighteen years shall be conclusively presumed wholly dependent on the parent with whom he is living, and that in case of divorce the charging of the full support and maintenance upon one of the parents shall constitute a living with such parent, a boy whose care, custody, maintenance, and education were awarded to his mother by a divorce decree requiring the father to pay her $10 per month for his support, maintenance, and education was not wholly dependent on the father. *Ninneman v. Industrial Comm.* 190

Findings of fact by industrial commission: Weight on review.

7. If there is any evidence to support an award of the industrial commission it cannot be set aside. *E. Weiner Co. v. Freygang,* 187

8. Under sec. 2394—19, Stats., the findings of the industrial commission are conclusive when supported by credible evidence. *Ninneman v. Industrial Comm.* 190

Action to review order and award: Adverse party.

9. The party in whose favor an award is made by the industrial commission is an "adverse party" within sec. 2394—19, Stats., requiring the "adverse party" to be made a defendant in an action against the industrial commission to review its orders and awards. *Youghiogheny & Ohio C. Co. v. Lasevich,* 347

Same: Costs: Discretion of court.

10. Under sub. 1, sec. 2394—22, Stats., the action of the trial court in awarding costs against plaintiff in an action to set aside

an award of the industrial commission cannot be disturbed, in the absence of an abuse of discretion. *Ninneman v. Industrial Comm.* 190

Same: Service of notice of entry of judgment by attorney general.

11. Where in an action in the circuit court to set aside an award of the industrial commission the claimant did not appear, but the attorney general appeared for the commission and secured affirmance of the award and served notice of entry of judgment on the employer, the employer, to perfect his appeal, under secs. 2394—21, 3042, Stats., limiting the time to thirty days from date of service by "either party on the other" of the notice of entry, must serve notice within thirty days on both the attorney general and claimant, the judgment being indivisible and notice of entry by the attorney general operating for both parties. *Sherwood v. Redfield,* 91

WRIT OF ERROR. See CRIMINAL LAW, 16.

WRIT OF MANDAMUS. See MANDAMUS.

WRONGFUL DISCHARGE. See MASTER AND SERVANT, 1.